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No. _____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

CENTRAL COLUMBIA SCHOOL DISTRICT and
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT
NO. 16,

Petitioners

vs.

RONALD POLK and CINDY POLK,
Parents and Natural Guardians of
CHRISTOPHER POLK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the provision of an individualized educational program (hereinafter "IEP") which has provided in the past, and will continue to provide, some educational benefits to the Respondent child satisfies the substantive requirements of the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. §1401 *et seq.* as determined in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982), or whether the Court of Appeals properly disregarded *Rowley* by imposing its own higher standard of required benefits?

B. Whether any genuine question of material fact exists with respect to whether the proposed IEP is reasonably calculated to enable the student to achieve educational benefits, when Respondents conceded and the record unequivocally confirmed that the IEP provided educational benefits, and when Respondents sought only an increase in the related services of physical and occupational therapy?

C. Whether the Court of Appeals properly questioned the procedural propriety of the Consultative Model *sua sponte* where the record establishes, without contradiction, that direct therapy could be provided within the model, where direct therapy availability is not a procedural issue and where the Respondents stipulated to the fulfillment of procedural requirements.

LIST OF ALL PARTIES

Parties in interest in this appeal are those named in the caption of this Petition.

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REFERENCE TO REPORTED OPINIONS OF LOWER COURTS AND ADMINISTRATIVE AGENCIES

The Opinions of the District Court and administrative agency have not yet been reported in any known official or unofficial reporters. The Opinion of the Court of Appeals is reported at 853 F.2d 171. Attached hereto in Appendix "A" are copies of the Opinions, Orders and Judgments issued by the United States Court of Appeals for the Third Circuit, United States District Court for the Middle District of Pennsylvania, the Secretary of Education for the Commonwealth of Pennsylvania and the Administrative Hearing Officer.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 26, 1988. A timely Petition for Rehearing En Banc was denied by Order of Court dated August 19, 1988.

The statutory provision which confers jurisdiction upon this Honorable Court to review the issues presented herein by Writ of Certiorari is 28 U.S.C. §1254(1).

STATEMENT OF STATUTES AND REGULATIONS INVOLVED IN THE CASE

The verbatim text of the following statutes and regulations are provided in Appendix "B", attached hereto. The citations to these provisions are as follows:

The Education of the Handicapped Act, 20 U.S.C. §1401(17), §1401(18), §1401(19), §1412(1), §1415(a)-(e).

Pennsylvania Statutes, Pa. Stat. Ann., tit. 63, §1302 (hereinafter "63 P.S. §1302.")

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION

Christopher Polk is a student within the Central Columbia School District (hereinafter "School District") and is provided educational and "related services" by the Central Susquehanna Intermediate Unit No. 16, (hereinafter "Intermediate Unit"). Shortly after his birth on December 17, 1973, Christopher suffered brain damage as a result of a condition known as encepolopathy, which is akin to cerebral palsy. As a result, Christopher has severe cognitive and motor deficiencies and has been placed in a trainable mentally retarded (hereinafter "TMR") class under the supervision of the Intermediate Unit. Christopher had been advanced from a Prognostic Program class for the Severely and Profoundly Mentally Retarded to the TMR class for the 1982-83 school year when he was nine years of age. He has been under the instruction of the Petitioners since the 1978-79 school year. According to psychological testing performed with Christopher on January 15, 1986, his full scale IQ was 22. While his movement is spastic in nature, he is able to ambulate with assistance. He has limited speech skills and communication utilizing a picture board is a goal area of his instruction.

The related services of physical and occupational therapy, the sole purposes of which are to enable Christopher to benefit from his instruction, are provided to Christopher by licensed therapists, under the proposed IEP which is at issue, on an "individual once per month or as needed" basis, and on a daily basis by Christopher's classroom teacher and individual aide. The Respondents have stipulated that the proposed IEP is identical to the IEP which was in effect for the previous school year and which is currently in effect pursuant to the "stay put" provision of the EHA found at §1415(e)(3). Accordingly, the case is not moot.

Physical and occupational therapies are provided to Christopher as supportive "related services" pursuant to the Intermediate Unit's "Consultation Model." This model of

delivery of services is prevalent within the Intermediate Unit and the record establishes without contradiction that it is of sufficient flexibility to permit the provision of "direct therapy", or hands-on treatment by licensed therapists as defined by the Respondents. Whether students other than Christopher within the Intermediate Unit receive "direct therapy" is not relevant: What is relevant is that the uncontradicted evidence of record demonstrates that this intense daily "direct therapy" service is available within the Intermediate Unit under the Consultation Model if the unique needs of a student so dictate. It is irrelevant that the record does not indicate whether any students actually do receive direct therapy, since there is no evidence that the unique needs of other students dictate the provision of direct therapy in order for them to benefit from their educational programs and there is no evidence in the record that such services are prohibited.[1]

The Consultation Model as specifically proposed to be applied to Christopher in his proposed IEP, calls for direct contact between Christopher and licensed therapists on an "individual once per month" basis, or more frequently if deemed necessary by the classroom teacher. During these contacts, the licensed therapists diagnose and evaluate Christopher and determine whether variations in his daily regimen are dictated. After performing their diagnosis and evaluation, the licensed therapists consult with the classroom teacher to determine Christopher's educational needs. This consultation is essential, since licensed therapists are not professional educators and related services are only pro-

1. The Court of Appeals found that, because certain Intermediate Unit personnel did not recall whether students within the Intermediate Unit had received direct therapy, a question of fact had been created as to whether there was a blanket denial of direct therapy. Regardless of the witnesses' recollection, the only proof in the record was that direct therapy was available. Rather than straining to create a factual issue where none existed, the Court of Appeals could have avoided complicating this litigation by ascertaining from counsel that approximately four students per year have received direct therapy.

vided where required to assist Christopher to benefit from his special education instruction. The consultation between the licensed therapists and the teacher are the essence of the Consultation Model, not the provision or lack of provision of "direct therapy." The record differentiates between the provision of medical treatment, which is not included in Christopher's program, and the evaluation and diagnostic services provided by the licensed therapists for Christopher.

After the diagnosis, evaluation and consultation, a program is developed by the licensed therapists who instruct the classroom teacher and aide on prescribed therapy techniques. During this instruction, and also during the diagnosis and evaluation, the licensed therapists do place their hands on Christopher and take him through therapy. The teacher and aide administer the techniques on a daily basis in a manner which integrates the therapy into Christopher's routine daily activities. The aide has only one student for whom she is responsible: Christopher Polk.

It is uncontroverted that Christopher has benefited and progressed under the Consultation Model, and that the benefits are meaningful. At several places within the record, the Respondents' attorney, the Respondent Cindy Polk and the Respondents' expert witnesses all agreed that Christopher was achieving educational benefits as a result of the past application of the Consultation Model and that the consultation which is the essence of the model is necessary within the educational setting. The Respondents' also stipulated in their Undisputed Statement of Facts that Christopher is achieving "some educational benefit" from his instruction.

Specifically, Christopher has learned to identify letters, to read his name consistently, to independently make one on one correspondence, to match numerals with eighty percent accuracy, to identify numerals zero through four with approximately seventy percent accuracy and to identify major coins. Functionally, he has learned to scoop and eat with a

spoon independently with good speed, to eat independently with a fork and to drink independently with a firm cup. He has learned to substantially assist in his toileting needs, to wash and dry his hands independently and to unzip and remove his jacket independently. Finally, he has developed the fine motor skills of pointing, picking up objects and twisting off jar lids, along with the gross motor skills of throwing and catching balls and the maintenance of a kneeling and standing position for substantial periods of time. None of these skills were present before Christopher came under the Petitioners' instruction. Christopher's parents have not rebutted the Petitioners' evidence that these skills were derived as a result of the Petitioners' instruction and related services. Not only is there no question of fact that Christopher is deriving some educational benefit, but there is no question of fact that Christopher is deriving meaningful educational benefit since he is progressing within goal areas under his IEP. Accordingly, there is no question of fact as to whether the proposed IEP is reasonably calculated to enable Christopher to obtain educational benefits.

Although Christopher's parents would submit that some of his progress was the result of two weeks of inpatient physical therapy treatment at Shriner's Hospital in July of 1985, even the Respondents' experts within the record acknowledged the importance of the Consultation Model in the classroom setting and agreed that Christopher is benefiting educationally from the Model's application. As with many of the conclusions of the Respondents, the foundation of this assertion is in their briefs and not in the record.

The Respondents requested a due process hearing concerning Christopher's proposed IEP for the 1985-1986 school year. Christopher's parents rejected the proposed program in favor of a plan which would include physical therapy by a licensed therapist on a more frequent basis. The Secretary of Education upheld the Hearing Officer's decision which found the proposed level and nature of therapy to be appropriate.

The District Court, upon Summary Judgment Motion submitted by the Respondents, dismissed the present action, holding that there was no question of fact that the proposed IEP contemplated a program which was reasonably calculated to enable Christopher to achieve educational benefits. The Court also found Christopher to be progressing toward the goals and objectives set forth in his IEP. Furthermore, the District Court properly held that application of the Consultation Model does result in the provision of a "free and appropriate public education" to Christopher.

On appeal, the Court of Appeals for the Third Circuit, first, erroneously read the record and found that a genuine question of material fact existed as to whether "direct therapy" could be applied within the constraints of the "Consultation Model." Following from this conclusion, the Court of Appeals held that a factual question existed as to whether there was a blanket policy within the Intermediate Unit to deny the provision of "direct therapy." The Court of Appeals viewed this as a procedural violation of the Act. The Petitioners have presented unrebutted evidence that direct therapy can be provided within the Consultation Model, and that the Court of Appeals has inexplicably converted a substantive matter into a procedural issue, where, in actuality, no procedural issue exists.

Secondly, the Court of Appeals departed from the "some benefit" standard enunciated by this Honorable Court in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982), substituting a subjective and amorphous "meaningful benefit" standard which required an inquiry into the degree of benefit being achieved by severely mentally handicapped students in order to value that benefit either as "meaningful" or "trivial." The Court then determined that the stipulated factual finding that Christopher has and will achieve "some educational benefit" was insufficient to prove that the IEP was appropriate. The Petitioners' timely Application for Rehearing En Banc was dismissed by the Court of Appeals on August 19, 1988.

Subject matter jurisdiction within the Federal Court system is conferred by the EHA at §1415(e)(4) and 28 U.S.C. §1331.

ARGUMENTS

A. THE QUESTION OF WHETHER THE SUBSTANTIVE STANDARD UNDER THE EHA IS SATISFIED BY A FINDING OF SOME EDUCATIONAL BENEFIT IS AN IMPORTANT QUESTION OF FEDERAL LAW AND THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECLINED TO UPHOLD THIS STANDARD AND HAS IMPOSED ITS OWN HIGHER STANDARD OF REQUIRED BENEFITS, IN CONFLICT WITH THE DECISION OF THIS HONORABLE COURT IN *HENDRICK HUDSON DISTRICT BOARD OF EDUCATION V. ROWLEY,* 458 U.S. 176 (1982) AND OTHER FEDERAL APPELLATE COURTS.

The most profound and disturbing aspect of the decision issued by the Court of Appeals for the Third Circuit is its unilateral imposition of a requirement that courts subjectively evaluate the degree of educational benefit being achieved by students like Christopher, whose progress is measured on a scale which is extremely difficult to apply even for professional educators, in flagrant disregard of this Honorable Court's decision in *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176 (1982). Specifically, the Court of Appeals' opinion requires a factual determination of whether the benefit being achieved by a severely mentally retarded child is "meaningful," in which case the program will be upheld as appropriate, or "trivial," thus rendering the program inappropriate. Since this Honorable Court in *Rowley* found that a program was appropriate where it conferred the opportunity to achieve some educational benefit and viewed the EHA as leaving to the state and local government authorities the primary respon-

sibility, discretion and methodology for developing educational programs, the Court of Appeals' decision is a radical departure from this Court's interpretation of the EHA. *See Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988).

In *Rowley*, this Honorable Court reviewed the case of Amy Rowley, a deaf student who sought the provision of a sign language interpreter in her classroom as a "related service," pursuant to the EHA at §1401(17). The School District had already taken several steps to adapt Amy's course of instruction to her disability: Several administrators attended sign language interpretation courses; the School District provided Amy with a teletype machine; and Amy was provided with an FM hearing aid to amplify the sounds she could hear. Despite these accommodations, the parents sought the related service of a sign language interpreter to assist Amy in all of her academic classes.

It is admitted that Amy Rowley's mental functioning was at the upper end of the spectrum, while Christopher Polk's level of functioning is certainly at the lower end. However, this distinction does not alter the legislative history which this Honorable Court accurately detailed in the *Rowley* Opinion. With marked insight into the broad range of disabilities afflicting handicapped children, this Honorable Court made clear that it was impossible to engage in a subjective valuation of the degree of benefit being achieved in cases such as the one presently at bar:

> The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirement of the Act presents a more difficult problem. The Act requires participating states to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

Rowley, 458 U.S. at 202. Directly prior to the above quoted portion of the *Rowley* Opinion, this Honorable Court stated that "some educational benfit" would suffice under the EHA:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. It would do little for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that states provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." (Emphasis partially in original, partially added.)

Rowley, 458 U.S. at 200-01. It cannot be overemphasized that this Honorable Court's use of the word "some" is the only adjective used to modify the type of benefit required under the EHA. Nowhere in the *Rowley* Opinion is it stated that "meaningful" benefits are a substantive requirement under the EHA. The Court of Appeals for the Third Circuit simply failed to follow the precedent set by *Rowley* that Courts are only to determine the presence or absence of the opportunity for benefit and are not to inquire into whether "enough benefit" is being achieved.

The Court of Appeals also placed undue emphasis upon self-sufficiency as an objective of the Act. Again, the *Rowley* decision conclusively establishes that self-sufficiency is not the legal mandate of the EHA:

> Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard which Congress imposed upon the states. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

Rowley, 458 U.S. at 201, n. 23. Inexplicably, the Court of Appeals for the Third Circuit merely paid lip service to this finding of legislative policy, and went on to place undue emphasis upon the goal of self-sufficiency in rendering its decision: "Furthermore, we observe, as did the majority in *Rowley*, that a key concern of and primary justification for the EHA lay in the important goal of fostering self-sufficiency in handicapped children." Court of Appeals Opinion at typescript p. 24.

It is undeniably clear that the Opinion of the Court of Appeals is directly in conflict with the decision of this Honorable Court in *Rowley*. The question of the substantive standard to be applied under the EHA is an important question of federal law, since the instant decision by the Court of Appeals, if allowed to stand, will substantially affect litigation under the EHA. Every administrative and court hearing will revolve around the question of whether the benefits being achieved by handicapped children are enough, a question which will be endlessly argued without the possibility of a determination without pure speculation. In cases involving severely mentally retarded students, as here, Courts will be required to answer questions which confound professional educators. Progress for children of Christopher's exceptionally is measured on a scale which is fractions of that which is applied to those of average functioning. Therefore, the standards for granting a Writ of Certiorari under Supreme Court Rule 17.1(c) have clearly been met.

The present case involves the second Opinion issued by the Court of Appeals for the Third Circuit which would require delving into degrees of progress or benefit. In *Board of Education of East Windsor v. Diamond*, 808 F.2d 987 (3rd Cir. 1986), the subject student not only failed to achieve benefits, but actually regressed under his program. Properly so, the Court found that the proposed IEP did not contain an appropriate program of instruction, due to the fact that no benefit or progress was achieved. Regression in *Diamond* obviously distinguishes that case from the case at

bar. However, the Court of Appeals in *Diamond*, as in the present case, stated that an inquiry must be made into whether only "trivial progress" is being achieved, in which case the educational program was to be declared inappropriate. The *Diamond* case, considered in conjunction with the present decision, clearly indicates that the Court of Appeals for the Third Circuit is proceeding on a tangent far removed from the standards set forth by this Honorable Court in *Rowley*. The Court also virtually ignored its earlier decision in *Wexler v. Westfield Board of Education*, 784 F.2d 176 (3d Cir.), *cert. denied*, 107 S. Ct. 99 (1986). The decision in *Wexler* conformed with the *Rowley* standards, however, it was relegated to a footnote in the Court's decision in the present case. For this reason, the Petitioners respectfully submit that issuance of a Writ of Certiorari in the present case is necessary to bring Court of Appeals for the Third Circuit into line with prior decisions of this Honorable Court.

A conflict also is developing among the various Courts of Appeals. Joining the Third Circuit in its view that "some educational benefit" is insufficient under the EHA is the Court of Appeals for the Fourth Circuit, as illustrated in *Hall by Hall vs. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985). In *Hall*, the subject student was of above average intelligence, but suffered from a dyslexic condition which rendered him functionally illiterate. Placement at an approved private school resulted in considerable progress while his former public school placement had resulted in no improvement of reading recognition scores and little overall improvement. Addressing the substantive requirements laid down by *Rowley*, the Court stated:

> Nor was the District Court compelled by a showing of minimal improvement on some test results to rule that the school had given James a FAPE. *Rowley* recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children.

> Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial.

Hall, 774 F.2d at 636. The *Hall* case may be distinguished from the present casee in that it recognized that it may be acceptable under the Act to demand only "minimal results in the case of the most severely handicapped children." Despite this, it can fairly be said that the Fourth Circuit has taken a position which is similar to that of the Third Circuit in the present case.

Contrary to the view of the Courts of Appeals for the Third and Fourth Circuits, the Court of Appeals for the First Circuit has clearly stated that the enabling of "some educational benefit" satisfies the substantive standards of the EHA. In *Abrahamson v. Hershman*, 701 F.2nd 223 (1st Cir. 1983), a severely retarded student sought placement in a residential facility, while the proposed IEP called for placement of the student in a "mainstreamed" program in a local school facility. The Court found that an appropriate program of instruction could not be provided in the public school facility and reasoned that, since some educational benefit could not be derived at the public facility, the private facility was necessary:

> A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for *some educational progress*. (Emphasis added.)

Abrahamson, 701 F.2d at 227.

Consistent with the Court of Appeals for the First Circuit, the District Court of Massachusetts applied the "some benefit" test in *Lang v. Braintree School Committee*, 545 F.Supp. 1221 (D Mass. 1982). In *Lang*, the School District

proposed an IEP calling for placement of a mentally retarded and seizure prone student in a local public school building, while the parents requested placement at an approved private school. As in the present case, the parent and the attorney complimented the proposed program, stating that it was "fine" and "good." The District Court of Massachusetts then provided:

> . . . The Supreme Court's analysis heavily emphasizes the Act's main purpose to assure that handicapped children receive *some* beneficial education at public expense . . . (Emphasis in original.)

Lang, 545 F. Supp. at 1227. It is notable that the *Lang* Court went to the extent of emphasizing the word "some" in the context of its opinion.

Joining the Court of Appeals for the First Circuit in determining that "some educational benefit" is the proper substantive standard under the EHA is the Court of Appeals for the Fifth Circuit. In *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983), the issue was whether school districts may deny consideration of an extended school year in excess of the standard 180 days. The Court concluded that the acquisition of some educational benefit is sufficient under the EHA:

> The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child.

Crawford, 708 F.2d at 1035. The Court in *Crawford* did recognize that passing from grade to grade does not, of itself, indicate that the student is actually achieving some educational benefit, however, it did confirm that a program is appropriate if some educational benefit is being derived.

Finally, the Court of Appeals for the Eighth Circuit indicated its alignment with the First and Fifth Circuits in *Springdale School District v. Grace*, 693 F.2d 41 (8th Cir. 1982). In *Grace*, the District Court directed placement of a deaf student at an approved private school for the deaf. The

Court stated that school districts need not provide the "best possible option," but only instruction which "will permit [the student] to benefit from the educational opportunity [being offered]." *Grace*, 693 F.2d at 43. Although not as clear as the First and Fifth Circuits, the *Grace* decision indicates that some benefit would be satisfactory for the Court of Appeals for the Eighth Circuit.

Other Circuits have repeated the familiar language that maximization of a student's potential is not an object of the Act, a concept which is very close to a determination that Courts are not to inquire into the potential of every given student. The inability to calculate potential is a result of the same imprecision which renders it difficult to determine the degree of benefit being achieved by the severely handicapped.

The EHA does not require states to make available the best possible option. *Grace, supra, Department of Education of State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 117 (1985). The Courts of Appeal have recognized that the limited available financial resources must be equitably distributed among all handicapped children. *A. W. v. Northwest R-1 School District*, 693 F.2d 41 (8th Cir.), *cert. denied*, 461 U.S. 927 (1982). As a result of the conflict between the Circuits, it is again apparent that this case warrants the issuance of a Writ of Certiorari pursuant to Supreme Court Rule 17.1(a).

B. THE COURT OF APPEALS ERRED BY *SUA SPONTE* CONCLUDING THAT A FACTUAL QUESTION EXISTED AS TO THE PROCEDURAL PROPRIETY OF THE CONSULTATION MODEL, SINCE DIRECT THERAPY IS AVAILABLE WITHIN THE MODEL AND BECAUSE THE LACK OF DIRECT THERAPY IS NOT A PROCEDURAL VIOLATION OF THE EHA.

The court of Appeals, with its errant holding, may also have stricken down the utilization of the Consultation Model

of delivery of physical and occupational therapy services. The Court found, first, that there was a question of fact as to whether any students within the Petitioners' ambit of instruction were receiving "direct therapy" under the Consultation Model. From this finding, the Court of Appeals reached the unfounded conclusion that a question of fact had been presented as to whether the Petitioners had in effect a blanket policy, under the Consultation Model, of denying its students "direct therapy." Finally, the Court concluded that if a factual finding is made that such a blanket policy exists to deny "direct therapy," such policy would be a "procedural" violation of the EHA.

The Petitioners maintain, first, that no question of fact as to the policy of the Petitioners in the delivery of direct therapy was presented for purposes of the Summary Judgment Motion granted by the District Court. It is unrebutted on the record that direct therapy is available within the confines of the Consultation Model. The essence of the Consultation Model is the exchange between therapist and teacher to determine what is appropriate for educational purposes, and not the nature of the service being delivered from therapist to student. The Court of Appeals accepted as true the unsupported allegation made by the Respondents in their brief and at oral argument that there were 65 students under the instruction of the Petitioner Intermediate Unit, none of which received direct therapy. The only mention of this in the actual record are statements by two witnesses acknowledging that they had no firsthand knowledge of any students receiving "direct therapy." This negative evidence, or lack of knowledge, cannot be used to raise an affirmative question of fact.

Even if discovery were to confirm that there are no students under the Petitioners' instruction which receive direct therapy, this fact cannot fairly lead to an inference that there is a blanket policy denying direct therapy. The Petitioners are located in a rural area in the Common-

wealth of Pennsylvania and, despite the Intermediate Unit having seventeen (17) school districts within its geographic area, it does have a relatively small number of students under its instruction. If none of their students are presently in need of direct therapy, it does not change the fact that the policy of the Petitioners under the Consultation Model does permit delivery of direct therapy. The evidence in the record as to this policy was affirmatively stated by witnesses and went unrebutted by the Respondents.

Secondly, even if a question of fact was presented regarding the existence of a blanket policy denying direct therapy, such blanket policy does not result in a procedural violation of the EHA, since "direct therapy," by it very nature, is not an educational service. The Court of Appeals allows the "tail to wag the dog" by elevating the importance of a "related service" to a virtual end in itself. The related services of physical and occupational therapy are to be provided only to enable the student to achieve educational benefit. 20 U.S.C. §1401(17); *Rowley, supra*. Moreover, as the Respondents define direct therapy, it would have no bearing on what occurs in the classroom. The Respondents would have the student removed from the school setting who would then be given intense treatment in a setting very similar to a hospital. Thus the substantial question presented is whether schools may be required to provide services equivalent to that provided by hospitals. It is interesting to note that the Respondents have attempted to utilize a stay by Christopher at Shriner's Hospital, in Philadelphia, Pennsylvania, as evidence of what progress could occur in the classroom. It is submitted by the Petitioners that this is comparing apples to oranges and illustrates the misdirection of the Respondents' arguments.

This Honorable Court in *Rowley, supra*, provided a two part analysis of the issues to be decided in an appeal under the EHA:

> Therefore, a court's inquiry in suits brought under §1415(e)(2) is twofold. First, has the State complied with the

> procedure set forth in the Act? And second, is the individualized educational program developed through the Act's procedures responably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 458 U.S. at 206-207.

The *Rowley* opinion thus explicitly defines those items which fall within the procedural aspect of the inquiry. Specifically, the State must have adopted the plan, policies and assurances required by the EHA, the school district must have created an I.E.P. in compliance with §1401(19) of the EHA and, finally, the procedural provisions of §1415(b) of the Act must have been followed. The Respondents do not assert that the Commonwealth of Pennsylvania has failed to adopt the plan policies and assurances required by the EHA, or that the proposed I.E.P. which was admitted into evidence at hearing does not meet the requirements of §1401(19). Finally, the mere presence of this case at this procedural level and the history to date indicated that the procedural safeguards under §1415(b) have been accorded to the Respondents. These are the exclusive procedural aspects of the Act. Alleged blanket denial of a policy which may include the provision of direct therapy cannot be called a procedural violation. The parents have been accorded each and every procedural right enumerated under the Act. They have been presented with an I.E.P., they were given notice of the recommended assignment of Christopher, they have refused to sign the proposed I.E.P., they have requested and been provided a hearing and have appealed the matter from this hearing through the Federal Court system.

In essence, the Court of Appeals for the Third Circuit has confused the procedural aspects of the Act with the substantive aspects of the Act. The sole inquiries must be whether Christopher Polk has been accorded the procedural safeguards enumerated under the Act and, substantively, whether an educational program has been proposed for

Chirstopher which is reasonably calculated to enable him to achieve educational benefits. Since the program proposed and in place is enabling Christopher to continue to progress, and the procedural safeguards have been met, the proposed program must be deemed to be "appropriate." The Third Circuit, however, has gone beyond this and has created additional procedural requirements under the Act.

In summary, no evidence of record could indicate that the Petitioners have in effect a blanket policy which results in denial of direct therapy to their students in need of such therapy. Secondly, even if a question of fact has been presented as to a policy of blanket denial of direct therapy, such policy is not a procedural violation under the Act. The inquiry still must be whether the subject student is able to benefit and achieve progress given the therapy program in place, no matter what label has been chosen for the model of delivery of that service. The Court of Appeals for the Third Circuit has done a great injustice in finding that a material question of fact has been presented which could constitute a procedural violation of the Act. As such, the present case again warrants close scrutiny by this Honorable Court of last resort.

CONCLUSION

The Petitioners respectfully request this Honorable Court to issue a Writ of Certiorari to the Court of Appeals for the Third Circuit to review the questions presented herein, based upon a conflict between the Court of Appeals for the Third Circuit and both this Honorable Court and other Courts of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5585

POLK, Ronald and POLK, Cindy,
parents and natural guardians
of Christopher Polk,

Appellants

v.

CENTRAL SUSQUEHANNA INTERMEDIATE
UNIT 16,
CENTRAL COLUMBIA AREA SCHOOL DISTRICT
and
BLOOMSBURG AREA SCHOOL DISTRICT,

Appellees

On Appeal From the United States
District Court for the
Middle District of Pennsylvania
(D.C. Civil No. 86-1784)

Argued January 19, 1988

Before: HIGGINBOTHAM, BECKER, *Circuit Judges*
and HUYETT, *District Judge**

(Filed July 26, 1988)

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* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

This appeal requires that we examine the contours of the "free appropriate public education" requirement of the Education of the Handicapped Act, as amended, 20 U.S.C. § § 1401-1461, (1982) (EHA), as it touches on the delivery of physical therapy, which is a "related service" under the EHA. Ronald and Cindy Polk are parents of Christopher Polk, a child with severe mental and physical impairments. They claim that defendants, the local school district and the larger administrative Intermediate Unit (which oversees special education for students in a five-county area) violated the EHA because they failed to provide Christopher with an adequate program of special education. Specifically, plaintiffs contend that defendants' failure to provide direct "hands-on" physical therapy from a licensed physical therapist once a week has hindered Christopher's progress in meeting his educational goals.

The district court granted summary judgment in favor of defendants. The court held that because Christopher derived "*some* educational benefit" from his educational program, the requirements of the EHA, as interpreted by the Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982), have been met, *see infra* at typescript page 24.

We will reverse the district court's grant of summary judgment for two reasons. First, we discern a genuine issue of material fact as to whether the defendants, in violation of the EHA procedural requirement for *individualized* educational programs, have refused, as a blanket rule, to consider providing

handicapped students with direct physical therapy from a licensed physical therapist. Second, we conclude that the district court applied the wrong standard in evaluating the appropriateness of the child's education. Although the district court relied upon language from a recent Supreme Court case, it took that language out of context and applied it beyond the narrow holding of the Supreme Court's opinion. More specifically, we believe that the district court erred in evaluating this severely handicapped child's educational program by a standard under which even trivial advancement satisfied the substantive provisions of the EHA's guarantee of a free and appropriate education. There is evidence in the record that would support a finding that the program prescribed for Christopher afforded no more than trivial progress. We will therefore reverse and remand for further proceedings consistent with this opinion.

I. STATUTORY BACKGROUND

The EHA requires that Pennsylvania, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education." 20 U.S.C. § 1412(1) (1982). The EHA mandates that participating states provide such education for all children "regardless of the severity of their handicap." 20 U.S.C. § 1412(2)(c) (1982). In pertinent part, the Act defines a free, appropriate, public education as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, ... and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982). The term "related

services" includes "physical and occupational therapy . . . as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17) (1982). Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP). 20 U.S.C. § 1401(18).

An IEP is "more than a mere exercise in public relations." *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570 (11th Cir. 1983), *vacated in part on other grounds*, 468 U.S. 1213 (1983), *reinstated in relevant part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985); indeed, it is the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 108 S. Ct. 592, 598 (1988). The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive. 20 U.S.C. § § 1401(19) (defining IEP), § 1414(a)(5) (requiring an IEP). In practice the multi-disciplinary team will, as appropriate, consist of a teacher, psychologist, physician, physical and/or vocational therapist and administrator. Input is also sought from parents.

Additionally, the EHA imposes extensive procedural due process requirements upon the participating states. Complaints brought by parents or guardians must be resolved at "an impartial due process hearing." 20 U.S.C. § 1415(b)(2). Any party dissatisfied with the state administrative hearing may bring a civil action in state or federal court. 20 U.S.C. § 1415(e). In such action, the district court must conduct an independent review based on the preponderance of the evidence but in doing so "due weight shall be given to [state administrative] proceedings." *Rowley*, 458 U.S. at 206.

II. FACTS & PROCEDURAL HISTORY

Christopher Polk is severely developmentally disabled. At the age of seven months he contracted encephalopathy, a disease of the brain similar to cerebral palsy. He is also mentally retarded. Although Christopher is fourteen years old, he has the functional and mental capacity of a toddler. All parties agree that he requires "related services" in order to learn. He receives special education from defendants, the Central Susquehanna Intermediate Unit #16 (the IU) and Central Columbia Area School District (the school district). Placed in a class for the mentally handicapped, Christopher has a full-time personal classroom aide. His education consists of learning basic life skills such as feeding himself, dressing himself, and using the toilet. He has mastered sitting and kneeling, is learning to stand independently, and is showing some potential for ambulation. Christopher is working on basic concepts such as "behind," "in," "on," and "under," and the identification of shapes, coins, and colors. Although he is cooperative, Christopher finds such learning difficult because he has a short attention span.

Although the record is not clear on this point, until 1980, the defendants apparently provided Christopher with direct physical therapy from a licensed physical therapist. Since that time, however, under a newer, so-called consultative model,[1] Christopher no longer receives direct physical therapy from a physical therapist. Instead, a physical therapist (one of two hired by the IU) comes once a month to train Christopher's teacher in how to integrate physical

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1. The parties seem to use the words "consultive," "consultative," and "consultation" interchangeably. We will use the term "consultative" in describing the services defendants currently provide.

therapy with Christopher's education.[2] Although the therapist may lay hands on Christopher in demonstrating to the teacher the correct approach, he or she does not provide any therapy to Christopher directly, but uses such interaction to teach the teacher. Plaintiffs do not object to the consultative method per se, but argue that, to meet Christopher's individual needs, the consultative method must be supplemented by direct ("hands on") physical therapy.[3]

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2. The defendants provide the following definition of consultative therapy:

> In the consultation model, the therapist interacts with the classroom teacher and/or other educators who deal with the child on a regular and consistent basis and who are ultimately responsible for the child's educational performance. The therapist as a consultant increases the teacher's awareness of a handicapped child's need. The therapist instructs the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences.

J.A. at 442. The district court made the following findings of fact:

> Under the Consultative Model no direct hands-on therapy is given to Christopher by licensed therapists. Instead, licensed therapists develop a program which is implemented by the classroom teacher and aide and the only contact the licensed therapists have with Christopher is a monthly monitoring of the delivery of the services by the classroom teacher and aide.

J.A. at 532.

3. The parties engage in a semantic debate concerning the word "direct." Defendants argue that, because the physical therapists provide their consultative services "directly" to Christopher, it is incorrect to claim that he receives no direct physical therapy. For clarity's sake we will distinguish assistance provided by a licensed physical therapist via the consultative method from direct "hands-on" physical therapy treatment provided to Christopher by a licensed physical therapist.

In support of this position, plaintiffs adduced evidence that direct physical therapy from a licensed physical therapist has significantly expanded Christopher's physical capacities. In the summer of 1985, Christopher received two weeks of intensive physical therapy from a licensed physical therapist at Shriner's Hospital in Philadelphia. According to Christopher's parents, this brief treatment produced dramatic improvements in Christopher's physical capabilities.[4] A doctor at Shriner's prescribed that Christopher receive at least one hour a week of direct physical therapy. Because the defendants were unwilling to provide direct physical therapy as part of Christopher's special education program, the Polks hired a licensed physical therapist, Nancy Brown, to work with Christopher at home. At the time of the hearing, she was seeing Christopher twice a week.

Plaintiffs acknowledge that the school program has benefited Christopher to some degree, but argue that his educational program is not appropriate because it is not individually tailored to his specific needs, as the EHA requires. Moreover, throughout all of the administrative and judicial proceedings that we now describe, plaintiffs have maintained that to comply with the EHA the defendants must provide, as part of Christopher's "free appropriate public education," one session a week with a licensed physical therapist.

Plaintiffs first challenged Christopher's IEP before a Commonwealth of Pennsylvania Department of Education Hearing Officer. At that hearing and in later depositions, the administrator of the IU, Christopher's teachers, the IU's physical therapy consultant,

4. Mrs. Polk testified that after Christopher's 13-day intensive experience in Shriner's he was much better able to feed himself; that his weight bearing, control over his body, and use of a walker were improved; and that he began kneeling on his own.

Christopher's current private physical therapist and his therapist from Shriner's all testified concerning Christopher's capabilities and educational needs. The Hearing Officer found that Christopher was benefiting from his education, and that his education was appropriate.[5] This finding was affirmed by the Pennsylvania Secretary of Education.[6]

After exhausting administrative remedies to their dissatisfaction, the Polks brought suit in the district court for the Middle District of Pennsylvania. The district court initially permitted plaintiffs to conduct discovery about whether any of the 65 students in the five county intermediate unit whose IEPs call for some sort of physical therapy had received individualized "hands-on" physical therapy. Concomitantly, the court rejected defendants' motion under Fed. R. Civ. P. 12(f) to strike from the complaint the allegations that no child in the IU received direct physical therapy. Defendants refused to respond to this discovery, and the district court granted plaintiffs' motion to compel. Plaintiffs then moved for additional discovery

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5. The hearing officer had found that Christopher was "benefiting from the special program of education being provided for him by the district and that he is progressing toward the goals and objectives set forth in his IEP." J.A. at 26. But as required by law the district court reviewed the facts independently. *See* 20 U.S.C. § 1415(e)(2); *Rowley*, 458 U.S. at 206.

6. This court recently held that the participation of the Pennsylvania Secretary of Education in the hearing process violated due process under the EHA because the Secretary of Education is a state employee (at least for the purposes of the EHA) and therefore cannot provide the "independent decision" based on an "impartial review" required by the EHA. 20 U.S.C.§ 1415 (1982). *See* Muth v. Central Bucks School Dist., 839 F.2d 113, 118, 120-126 (3d Cir. 1988). Because the question is not before us, we do not rely on such deficiency in the procedural scheme in our decision.

concerning the services provided to other handicapped students. However, before the district court ruled on that request (and before the defendants provided any additional information), the district court granted summary judgment for the defendants. Relying on the Supreme Court's decision in *Rowley*, 458 U.S. at 206-07, the court held that the provisions of EHA had been met because Christopher had received *some* benefit from his education. This appeal followed.

Plaintiffs present two arguments on appeal. First, they submit that the defendants violated EHA's procedural requirements because Christopher's program is not truly individualized.[7] Plaintiffs rely, in this regard, on the defendants' failure to provide direct ("hands on") physical therapy from a licensed physical therapist to *any* of the children in the intermediate unit (a fact they learned during Christopher's due

7. Defendants claim that this procedural argument was not raised in the district court. Although we acknowledge that the references to the procedural argument were obscure, we disagree. Count ten of plaintiffs' complaint charges that: "not one of such students [in the Unit] received the delivery of either service directly from a licensed occupational or physical therapist but rather was afforded the related service through the consultive mode." J.A. at 526. Then, in point 4 of plaintiffs' motion for taking of additional testimony, pursuant to 20 U.S.C. § 1415(e)(2) (allowing plaintiffs to present new evidence), plaintiffs set out their procedural theory of the case: "The Plaintiff contends that the application of the consultive model to all handicapped children deprives Christopher Polk of a unique educational program as required by the Education for the Handicapped Act." J.A. at 522. Additionally, in rejecting the defendants' 12(f) motion to strike, the district court took note of the plaintiffs' theory observing "that Paragraphs 9 and 10 set forth the factual basis for the assertion that not only is Christopher Polk's program not appropriate, but it is not individualized." J.A. at 527. Finally, Plaintiffs' Brief Contra Defendants' Motion for Summary Judgment, Polk v. Central Susquehanna Intermediate Unit, Civ. No. 86-1784 at 23, argued that summary judgment should be denied "because as a matter of law Christopher Polk's Individualized Educational Program is inherently not unique."

process hearing before the state examiner). This failure, they contended, is evidence that the defendants have an inflexible rule prohibiting direct therapy and that such a rigid rule conflicts with the EHA's mandate of providing *individualized* education. Plaintiffs argue that genuine questions of material fact exist as to the defendants' willingness to provide direct physical therapy under any circumstances, and that such disputes preclude summary judgment.

Second, plaintiffs assert that Christopher's education is inadequate to meet his unique needs. They claim that the district court found Christopher's education appropriate only because it applied an erroneous legal standard in judging the educational benefit of Christopher's program.

III. ROLE OF PHYSICAL THERAPY IN PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EHA

For some handicapped children, the related services provided by the EHA serve as important facilitators of classroom learning. In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), the Supreme Court unanimously held that the EHA required the provision of in-school intermittent catheterization services to a child with spina bifida so that she could attend a regular public school class. The Court distinguished between the types of related services contemplated by the EHA and the medical care that requires a doctor. In so doing, the Court explicitly acknowledged the importance of related services to the scheme of the EHA: "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists.'" *Id.* at 893 (quoting S. Rep. No. 94-168, p. 38 (1975).

For children like Christopher with severe disabilities, related services serve a dual purpose. First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. *See* P.H. Pearson & C.E. Williams, ed. *Physical Therapy Services in the Developmental Disabilities* 173 (hereinafter *Physical Therapy*) (noting close relationship between speech and head, trunk, and arm control).[8] As we explained in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), in discussing children with severe emotional disturbances:

> Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social and arithmetic skills, such as counting, making change, and identifying simple words.

Id. at 275.

Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational

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8. Physical therapy is essential for a child like Christopher because, in order to learn basic skills, he must learn to use his muscles properly. A key function of physical therapy is to normalize tonic reflex patterns. For example, abnormal muscle tone is a distinguishing characteristic of cerebral palsy and related problems. *See Physical Therapy*, *supra*, at 76. Whereas low muscle tone is too flaccid to fix posture; high muscle tone interferes with mobility. *Id.* at 357. *See infra* Section V(C).

program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very different from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy." *DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984). In Christopher's case, physical therapy is not merely a conduit to his education but constitutes, in and of itself, a major portion of his special education, teaching him basic skills such as toileting, feeding, ambulation, *et alia*.

IV. THE PLAINTIFFS' PROCEDURAL CLAIM (THAT CHRISTOPHER'S EDUCATIONAL PLAN WAS NOT INDIVIDUALIZED)

As we noted above, the plaintiffs have offered to prove that the defendants never genuinely considered Christopher's unique needs because of a rigid policy of providing only consultative physical therapy. They adduced evidence during cross examination at the state administrative hearing that none of the 65 children in defendants' intermediate unit whose IEPs call for physical therapy actually receive direct physical therapy. The plaintiffs also contend that, since the adoption of the consultative model, this rigid policy has precluded the defendants from recognizing Christopher's individual needs in violation of the EHA.[9] Plaintiffs submit that the district court did not recognize the force of this procedural argument, and hence erred in granting summary judgment when a genuine issue of material fact existed as to the

9. Furthermore, plaintiffs assert that certain important goals for Christopher's education have been forsaken because those goals, such as increased muscle tone, are only attainable through direct physical therapy. As we see it, this argument goes more to the plaintiff's substantive than to their procedural claim. *See infra* Section V(C).

willingness of the defendants to provide direct physical therapy to any child.

The defendants respond that it is, and always has been, their position that direct therapy would be provided, if needed. The therapist who consults monthly with Christopher's teacher testified before the Department of Education hearing examiner that she would provide therapy treatment directly if she determined that such therapy were appropriate. The previous physical therapy consultant and the administrator of the IU similarly claimed in testimony before the hearing examiner that direct physical therapy would be provided, if needed, but that such a case has never arisen for Christopher nor for any other student in the Unit.

Critical to resolution of this question are the Act's procedural protections. To repeat, the centerpiece of the procedural scheme is the IEP. *See supra* Section I. As the Supreme Court has noted, an essential protection of the EHA stems from the parental participation in the formulation of an IEP for the child's special education. *See Rowley* at 208 ("Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, . . . and in the formulation of the child's individual education program."). This system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's "unique needs." 20 U.S.C. 1401(16). *Accord Rowley*, 458 U.S. at 209.

In *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), this court held that Pennsylvania's inflexible policy of limiting special education to 180 days per year, regardless of individual need, violated the EHA. We noted that:

> At the core of the Act is a detailed procedure for determining the contours of the free appropriate public education to be delivered to each child. We believe that these procedural safeguards require individual attention to the needs of each handicapped child.

629 F.2d at 280 (citations omitted). We stated that Pennsylvania's 180-day policy conflicted "with the Act's emphasis on the individual." *Id.* at 280. Similarly, in *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), *vacated in part on other grounds*, 468 U.S. 1213 (1983), *reinstated in relevant part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985), the Court of Appeals for the Eleventh Circuit held that the application of across-the-board findings to all profoundly retarded children in lieu of individual consideration of their unique needs was impermissible under the EHA.[10] As *Georgia Association* explained, the force of this conclusion, "by itself, does not impose a substantive standard on the state; it requires no more than that the state *consider* the need . . . when developing a plan of education and related support services that will benefit a handicapped child." 716 F.2d at 1576.

In our view, a rigid rule under which defendants refuse even to consider providing physical therapy, as did the rule struck down in *Battle*, would conflict with Christopher's procedural right to an individualized program. Drawing all reasonable inferences in favor of the non-moving party, see *Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir. 1985), we believe that a genuine

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10. We note that in *Georgia Association* the Court of Appeals for the Eleventh Circuit, speaking through Judge Tuttle, refused to disturb a district court's finding that a local school district limited special education to a 180-day school year, even though defendants denied having such a policy. 716 F.2d at 1573-74.

dispute exists over whether the defendants would consider, under any circumstances, offering direct physical therapy, and that this dispute is over material facts, precluding summary judgment. Concomitantly, we believe that plaintiffs should be given an opportunity to continue their discovery into this question because the existence of a rigid rule prohibiting such therapy would violate the EHA. Therefore, we will reverse and remand the district court's decision for inquiry into whether defendants possess a rigid policy prohibiting the provision of direct physical therapy to children in the IU.

V. PLAINTIFFS' SUBSTANTIVE CLAIM (THAT THE COURT MISAPPLIED THE LEGAL STANDARD FOR EVALUATING APPROPRIATE EDUCATION)

A. *The Supreme Court's Opinion in* Rowley

We begin our discussion of the substantive protections of the EHA with the Supreme Court's opinion in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), because the parties' arguments are so closely tied to that case; only in the context of *Rowley* can we intelligently present the parties' contentions and the district court's opinion.

Rowley concerned an eight year old deaf child, Amy Rowley, whose parents requested a full-time interpreter to assist her in school. The school district's refusal to provide this service under the EHA generated the dispute. Amy possessed some residual hearing and was an excellent lip reader. She was an above average student who performed at the level of her grade and was advancing from grade to grade in her regular public school classroom. Because of her hearing disability, she could only understand about 60% of

what transpired in class. Nevertheless, she performed impressively in a "mainstreamed" classroom.

The school had made substantial efforts to assist Amy. Before her arrival at school, a number of administrators learned sign language to communicate with her. At the time of her request for a full time interpreter, the school was already providing Amy with a special FM hearing aid, speech therapy, and tutoring for the deaf. In addition, Amy's parents, who also were deaf, could communicate with the school by a teletype machine specifically installed in the principal's office for that purpose.

The Supreme Court held that Amy was not entitled to a private interpreter as part of her IEP under the EHA even though she could not follow 100% of the class' activities without such extra assistance. The Court analyzed the EHA and held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189.[11] The Court thus explained that the purpose of the Act was to provide a basic level of educational opportunity, not to provide the best education money can buy. *See id.* ("certainly the language of the statute contains no requirement . . . that states maximize the potential of handicapped

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11. At various points, the Court reiterated its holding that "the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education. . . ." *Id.* at 195; *accord id.* at 203 ("Insofar as a State is required to provide a handicapped child with a 'free appropriate public education' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.")

children"); *id.* at 197 n.21 ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential- maximizing education."); *Muth v. Central Bucks Schools Dist.*, 839 F.2d 113, 119 (3d Cir. 1988) (citing *Rowley*). However desirable the goal of maximizing each child's potential may be in terms of individuals, the Court obviously recognized that achieving such a goal would be beyond the fiscal capacity of state and local governments, and that Congress had realized that fact as well.

Furthermore, the Court cautioned against too much judicial interference in the substance of the child's education. It concluded that, where a handicapped child is receiving an appropriate education, it is not the job of this court or any other to dictate educational methods to special education experts. *See Rowley*, 458 U.S. at 208 ("once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States") (citations and footnotes omitted); *Rettig v. Kent City School Dist.*, 720 F.2d 463, 465-66 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984). Instead, the Court focused on *access* to special education rather than the content of that education. It quoted at length the legislative history of the EHA, holding that its sponsors emphasized receipt of educational services rather than any specific form or level of educational benefit. *Id.* at 195-97; *see id.* at 200 ("neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access"). Adverting to the legislative history, the Court concluded that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.

Although the tenor of the *Rowley* opinion reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education and its emphasis on the *procedural* protection of the IEP process, it is clear that the Court was not espousing an entirely toothless standard of substantive review. Rather, the *Rowley* Court described the level of benefit conferred by the Act as "meaningful." 458 U.S. at 192. As the Court explained:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*.

Id. (emphasis added). After noting the deference due to states on questions of education and the theme of *access* rather than a guarantee of any particular standard of benefit, the Court acknowledged that:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17). We therefore conclude that

> the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 200-01 (emphasis in original).

The preceding quotation demonstrates that the Supreme Court in *Rowley* did not abdicate responsibility for monitoring the substantive quality of education under the EHA. Instead, it held that the education must "provide educational benefit." The Court thus recognized that the substantive, independent judicial review envisioned by the EHA was not a hollow gesture. Instead, courts must ensure "a basic floor of opportunity" that is defined by an *individualized* program that confers benefit.

Finally, it is important to note that, notwithstanding *Rowley*'s broad language, the Court indicated that its holding might not cover every case brought under the EHA. Indeed, *Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a "mainstreamed" classroom. The Court self-consciously limited its opinion to the facts before it:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id. at 202.[12]

Although we do not argue that *Rowley* "contradicts itself," *id.* at 212 (White, J., dissenting), we nevertheless note the tension in the *Rowley* majority opinion between its emphasis on procedural protection (almost to the exclusion of substantive inquiry) and its substantive component quoted and discussed *supra* typescript at 21-22.[13] This tension is unresolved in the *Rowley* case itself because the facts of the case (including Amy Rowley's quite substantial benefit from her education) did not force the Court to confront squarely the fact that Congress cared about the quality of special education. In the case *sub judice*, however, the question of how much benefit is sufficient to be "meaningful" is inescapable. Therefore we must examine the Act's notion of "benefit" and apply a standard that is faithful to Congressional intent and consistent with *Rowley*.

.B. *EHA Requires More than a De Minimis Benefit*

We hold that the EHA calls for more than a trivial educational benefit. That holding rests on the Act and its legislative history as well as interpretation of *Rowley*.

1.

The opinion of the district court, anchored to the "some benefit" language of *Rowley*, 458 U.S. at 200, explained its holding as follows:

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12. Indeed, in a footnote, the Court observed that the fact that a child was advancing from grade to grade would not necessarily suffice in every case to assure that the education would be deemed appropriate. *Rowley*, 458 U.S. at 203 n.25.

13. The *Rowley* dissenters argued that the EHA was designed to maximize the educational benefit of handicapped children and that Amy Rowley could not achieve equal educational opportunity without a full-time interpreter in her classroom.

> The fact that Christopher would advance more quickly with intensive therapy rather than the therapy he now receives does not make the School District's program for Christopher defective. Programs need only render some benefit; they need not maximize potential . . . . The Supreme Court has determined that the Act is primarily a procedural statute and does not impose a substantive duty on the state to provide a student with other than *some* educational benefits. Increased muscle tone may well fall outside of the scope of the requirement that Christopher receive some educational benefits from the program in which he is enrolled.

J.A. at 537-38 (citations omitted) (emphasis in original).

Plaintiffs argue on appeal that the district court applied the wrong standard in measuring the educational benefit of Christopher's program and that the case should be remanded for further proceedings consistent with the correct standard, one that requires more than a *de minimis* benefit. Defendants rejoin that *Rowley*'s announcement of a "some benefit" test precludes judicial inquiry into the substantive education conferred by the Act, so long as the handicapped child receives any benefit at all. Noting that Christopher's parents acknowledge that he derives some benefit from his education, defendants submit that the inquiry is over and that the district court's summary judgment must be affirmed.

Our review of the legal standard applied by the district court is plenary. *See Muth*, 839 F.2d at 120 (citing *Universal Mineral, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981); *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176, 181 (3d Cir.), *cert. denied*, 107 S. Ct. 99 (1986).

2.

Because *Rowley* is a narrow decision, our decision must perforce also be informed by the text of the EHA and the legislative history of the 1975 amendments. Accordingly, we turn to a discussion thereof. Our interpretation of "educational benefit" is informed by the text of the EHA and by the legislative history concerning the passage of the 1975 amendments. The self-defined purpose of the EHA is to provide "*full* educational opportunity to all handicapped children." 20 U.S.C. § 1412(2)(A) (emphasis added). Similarly, the Senate Report on the 1975 amendments defined related services as "transportation, developmental, corrective, and supportive services (specifically including at least speech pathology and audiology, psychological services, counseling services, physical and occupational therapy, and recreation) necessary for a handicapped child to *fully benefit* from special education." Sen. R. No. 168, 94th Cong., 1st Sess. at 42 (emphasis added). The House Report echoes this language, citing the EHA's "goal of providing each handicapped child with a free, *full*, public education." H. Rep. No. 332, 94th Cong. at 11 (1975) (emphasis added). *See also* 121 Cong. Rec. 19482 (remarks of Senator Randolph, W. Virginia, Chair, Senate Subcommittee on the Handicapped) (discussing the goals of the EHA as "[a]chieving a goal of full educational opportunities"). Although the Supreme Court has instructed that Congress did not intend to provide optimal benefit, the Act's use of the phrase "full educational opportunity" and the EHA's legislative history indicate an intent to afford more than a trivial amount of educational benefit.

We note that the dissent in *Rowley* compiled a long list of statements made by Senators and Representatives sponsoring the 1975 amendments

indicating that the purpose of the Act was to provide equal educational opportunity. *See* 458 U.S. at 213-14 (White, J., dissenting).[14] We do not reference this compendium for the broad proposition that the Act requires the states to maximize a handicapped child's education, as did the three dissenting Justices (Justices Brennan and Marshall joined in Justice White's dissent; Justice Blackmun wrote a separate opinion concurring in the majority opinion). Nevertheless, we may rely on these statements for the narrower proposition that the legislators who passed the EHA did not envision merely a trivial benefit to handicapped children.

Furthermore, we observe, as did the majority in *Rowley*, that a key concern of and primary justification for the EHA lay in the important goal of fostering self-sufficiency in handicapped children. *See* H. Rep. No. 332, 94th Cong., 1st Sess. at 11 (1975) ("taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions"); *Rowley*, 458 U.S. at 201 n.23 (quoting extensively from the legislative history of the EHA concerning self-sufficiency). The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise -- the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency,

14. Indeed, the House Report to the 1975 Amendments explained that a "fundamental tenet[]" of the Act is that "each child requires an educational plan that is tailored to achieve his or her maximum potential." H. Rep. No. 332, 94th Cong. at 13 (1975).

eventually redounds to the benefit of the public fisc as these children grow to become productive citizens. *See* H. Rep. No. 332, *supra*, at 11 ("with proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society"); 121 Cong. Rec. 19492 (1975) (remarks of Senator Williams); *id.* at 19505 (remarks of Senator Beall).

Implicit in the legislative history's emphasis on self-sufficiency is the notion that states must provide some sort of meaningful education -- more than mere access to the schoolhouse door. We acknowledge that self-sufficiency cannot serve as a substantive standard by which to measure the appropriateness of a child's education under the Act. *See Rowley*, 458 U.S. at 201 n.23. Indeed, Christopher Polk is not likely ever to attain this coveted status, no matter how excellent his educational program. Instead, we infer that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom -- enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society. Therefore, the heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggests that the "benefit" conferred by the EHA and interpreted by *Rowley* must be more than *de minimis*.

We believe that the teaching of *Rowley* is not to the contrary. As discussed above, the *Rowley* Court described the education that must be provided under the EHA as "meaningful." The use of the term "meaningful" indicates that the Court expected more than *de minimis* benefit. We note in this regard that the facts of *Rowley* clearly indicate that the "benefit"

Amy was receiving from her educational program was substantial, and that "some benefit," in the case of Amy, meant a great deal more than a negligible amount.

However, to the extent that dicta in *Rowley* might be read to imply that courts should not become involved in the substantive aspects of the EHA, we find *Rowley* distinguishable from the case *sub judice*. As discussed in Section V(A), *supra*, *Rowley* specifically limited itself to the facts before it, involving a hearing-impaired child advancing from grade to grade in a "mainstreamed" classroom. Because the Court so self-consciously restricted the scope of its holding, we may (as we did above) reexamine the policies and the legislative history of the EHA to inform our decision.

Additionally, *Rowley* is distinguishable from the case *sub judice* because of the type of services requested. Unlike the services of a full-time interpreter (which arguably may be deemed extraordinary assistance), physical therapy, as discussed above in Sections I and III, is an integral part of what Congress intended by "appropriate education" as defined in EHA, and it is an essential part of Christopher's education. For example, physical therapy is cited as an example of the type of related services available under the Act. *See* 20 U.S.C. § 1401(17). Moreover, federal regulations implementing EHA specifically define physical therapy as "services provided by a qualified physical therapist." 34 C.F.R. § 300.13 (1987). *Cf. T.G. v. Bd. of Educ. of Piscataway*, 576 F. Supp. 420, 423-24 (D.N.J. 1983) (distinguishing "extraordinary sign language services" of *Rowley* from psychological services that are specifically set out in EHA and regulations), *aff'd*, 738 F.2d 425 (3d Cir.), *cert. denied*, 469 U.S. 1086 (1984).

Finally, because of the severity of Christopher's disabilities and their qualitative difference from those

of Amy Rowley, it is difficult to apply *Rowley* here. Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important. *See DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984); *see also Rowley*, 458 U.S. at 202 ("It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."). Indeed, the needs of children like Christopher were paramount in the eyes of the EHA sponsors. The EHA provides that the most severely handicapped children be served first. *See* 20 U.S.C. § 1412(3). That Christopher may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of EHA's mandate. Therefore, although we believe the holding in *Rowley* is compatible with our holding in this case, to the extent that dicta in the opinion tend to undermine our substantive standard, we find the *Rowley* case distinguishable.

3.

This court recently has had occasion to interpret and apply the *Rowley* standard in the context of a severely impaired child. In *Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986), we expressly rejected the argument that when the Supreme Court in *Rowley* referred to "some benefit," it meant any benefit at all, even if the child nevertheless regressed. The case involved a child, Andrew Diamond, with severe physical, neurological, and emotional handicaps. Despite evidence that Andrew's learning skills were deteriorating and his behavior was becoming

counterproductive, the state resisted transferring Andrew from his placement in a day program to a placement in a residential program. As a result, Andrew's parents put him in a residential program and paid for it themselves.

After a due process hearing, the school board was ordered to place Andrew in an appropriate residential setting. The school board filed an action in federal court seeking a day placement for Andrew. The district court, however, endorsed the residential placement and ordered the school district to reimburse Andrew's parents for the expenses incurred when paying for his residential placement themselves.

In *Diamond*, we thus confronted and rejected the very argument that the defendants make here:

> The School District's legal argument is that it is obliged by governing law to provide no more for Andrew Diamond than will be "of benefit" to him. The governing law, however, clearly imposes a higher standard.

Id. at 991. After observing that "the *Rowley* standard of enabling one to achieve passing marks and advance from grade to grade probably is not achievable for Andrew," *id.*, the court observed:

> But *Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely. The School District's "of benefit" test is offered in defense of an educational plan under which educational regression actually occurred. Literally the School Board's plan might be conceived as conferring some benefit to Andrew in that less regression might occur under it than if Andrew Diamond had simply been left to vegetate. The Act, however, requires a plan likely to produce progress, not regression or trivial educational advancement.

Id. (emphasis in original). The teaching of *Diamond* is that, when the Supreme Court said "some benefit" in *Rowley*, it did not mean "some" as opposed to "none." Rather, "some" connotes an amount of benefit greater than mere trivial advancement.[15]

Defendants seek to distinguish *Diamond*, arguing that *Diamond* was a more egregious case, whereby regression had occurred under the state's educational plan (there has been no regression here). Although we acknowledge that this distinction has some force, and that *Diamond* does indeed stand for the proposition that a child who is regressing (and whose regression can be reversed by reasonable means) is not receiving sufficient "benefit" under the Act, we believe that *Diamond* can and should be read more expansively.

Indeed, defendants' distinction of *Diamond*, if carried to its logical conclusion, would arguably render that case more expansive because progress for some severely handicapped children may require optimal benefit. As we noted in *Battle*, 629 F.2d at 269, severely handicapped children (unlike normal children) have a strong tendency to regress. A program calculated to lead to non-regression might actually, in the case of

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15. In Wexler v. Westfield Bd. of Educ., 784 F.2d 176 (3d Cir.) *cert. denied*, 107 S. Ct. 99 (1986), the court rejected the reimbursement claim of parents of a neurologically impaired child. The parents unilaterally chose private placement instead of the educational program devised by the state. In concluding that the district court had correctly applied the legal standard derived from *Rowley*, the court inquired whether the special education was "'reasonably calculated to enable the child to receive educational benefits.'" 784 F.2d at 181 (quoting *Rowley*, 458 U.S. at 207). However, the court's discussion was brief. The opinion provides no detail concerning the nature of the state's program or the differences between that program and the program that the parents requested, and the court did not elaborate upon the standard, or address the possibility of de minimis benefit. We are therefore unable to draw significant instruction from this case.

severely handicapped children, impose a greater burden on the state than one that requires a program designed to lead to more than trivial progress. The educational progress of a handicapped child (whether in life skills or in a more sophisticated program) can be understood as a continuum where the point of regression versus progress is less relevant than the conferral of benefit. We note that it is therefore possible to construe *Diamond*'s holding not solely as an issue of progress or regression but also as requiring that any educational benefit be more than *de minimis*.

Furthermore, serious problem with defendants' attempted distinction of *Diamond* lies in defendants' implicit suggestion that a child must first show regression before his parents may challenge the appropriateness of his education. But we do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress. Finally, to the extent that defendants may correctly argue that the central focus of *Diamond* is regression, and that any language concerning "trivial benefit" is dicta, for the reasons set forth above, we find that dicta to be absolutely correct and in line with our analysis of *Rowley* and the legislative history of the EHA.

4.

To summarize, in our view, the danger of the district court's formulation is that under its reading of *Rowley* the conferral of any benefit, no matter how small, could qualify as "appropriate education" under the EHA. Under the district court's approach, carried to its logical extreme, Christopher Polk would be entitled to no physical therapy because his

occupational therapy offers him "some benefit."[16] We do not believe that such a formulation reflects congressional intent in light of the importance of related services (particularly physical therapy) in the statutory and regulatory scheme. Just as Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit. Put differently, and using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit.

We further conclude that *Rowley*, although it prescribes restraint and warns that Congress did not intend the Act to maximize a child's potential, does not militate against the standard we have announced. Because the test employed by the district court ostensibly could have allowed only a *de minimis* benefit, we must remand in light of our interpretation. Finally, we do not read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions that ensure a free and appropriate education to Christopher. *See Georgia Ass'n of Retarded Persons*, 716 F.2d at 1569 (noting the "central role states play in educating their citizens" but observing that "a state's responsibility for providing education is bounded by certain congressionally developed concerns once the state accepts federal financial assistance under the Act").

Obviously, this court is in no position to determine the factual question whether the treatment the

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16. According to the district court's approach, major areas of need (such as normalized muscle tone) could be omitted entirely from coverage. *See supra* typescript at 24 (quoting district court's opinion).

defendants currently provide for Christopher is appropriate. We are, however, obligated to correct errors of law on appeal, and we hold that the district court applied the wrong standard in granting summary judgment for defendants when it allowed for the possibility of only *de minimis* benefit.

C. *Under the Correct Standard Must Summary Judgment Nevertheless be Affirmed?*

Although defendants acknowledge that direct hands-on therapy would be beneficial to Christopher, they argue it is not essential to the conferral of an appropriate education. Defendants submit that "in view of Christopher's exceptionality. . . . Christopher's progress has been outstanding." Br. of School Dist. at 8. The defendants presented testimony from the licensed physical therapist who consults with Christopher's teachers that indicates that he is progressing as quickly as can be expected given his multiple handicaps, and that the consultative model serves his needs.

Plaintiffs, by virtue of the evidence they adduced concerning Christopher's remarkable improvements in a short period of time at Shriner's, have provided at least some indication that his education may be inappropriate. *See supra* n.4 (outlining Christopher's dramatic improvements achieved at Shriner's). Furthermore, they claim that Christopher has been working on some of the same skills for years, and that even accounting for his exceptionalities, his progress has been *de minimis*. For instance, there is a factual dispute among the parties concerning Christopher's progress in self-dressing and self-feeding. Plaintiffs contend that significant improvements in these areas attributable to the program at Shriner's and the direct physical therapy Christopher receives at home contrast markedly with the trivial advancement in fine and

gross motor control that Christopher experienced as a result of seven years of public education under the consultative model.

Two private therapists who worked with Christopher at the Shriner's Hospital in Philadelphia in July 1985 each testified that Christopher needs direct physical and occupational therapy in his school by licensed and trained professionals. As their attorney explained at oral argument, the plaintiffs contend that the physical therapy provided by Christopher's teacher is akin to a sophisticated gym class, where Christopher practices bouncing a ball and other physical activities. They assert that such guidance, though helpful to Christopher, cannot substitute for direct physical therapy by a licensed physical therapist, which involves professional monitoring of discrete muscle behavior and frequent adjustments in response to improvement by the student.

Most important to plaintiffs are their contentions that Christopher cannot improve muscle tone without the assistance of a licensed physical therapist and that the state has ignored whole categories of need. *See supra* typescript at 34. They adduced testimony in support of their assertion that a teacher and a teacher's aide are not qualified to deliver certain essential services and that Christopher's IEP contains goals requiring the direct attention of licensed physical therapists beyond the capacity of the consultative model. *See* J.A. at 327-31 (to prepare a child for gross motor tasks, a physical therapist must first normalize muscle tone and breakdown the goals into a task analysis; evaluation of muscle tone requires a knowledge of neurophysiology).

We recognize the difficulty of measuring levels of benefit in severely handicapped children. Obviously, the question whether benefit is *de minimis* must be

gauged in relation to the child's potential. However, we believe that the extent of the factual dispute concerning the level of benefit Christopher received from his educational program precludes summary judgment under the standard that we announce today. The judgment of the district court will therefore be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5585

POLK, Ronald and POLK, Cindy,
parents and natural guardians
of Christopher Polk,

Appellants

v.

CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16,
CENTRAL COLUMBIA AREA SCHOOL DISTRICT
and
BLOOMSBURG AREA SCHOOL DISTRICT,

Appellees

(D.C. Civil No. 86-1784)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, and HUYETT, *District Judge**

The petition for rehearing filed by appellee Central Columbia School District having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

*The Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

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Circuit Judge

DATED: August 19, 1988

United States District Court
FOR THE
Middle District of Pennsylvania

RONALD POLK and	:	
CINDY POLK, Parents and	:	Civil No. 86-1784
natural guardians of	:	
CHRISTOPHER POLK,	:	Complaint Filed 12/17/86
Plaintiffs	:	(Judge Muir)
vs.	:	
CENTRAL SUSQUEHANNA	:	
INTERMEDIATE UNIT 16;	:	
and CENTRAL COLUMBIA	:	
AREA SCHOOL DISTRICT,	:	
Defendants	:	

OPINION

MUIR, *District Judge.*

I. *Introduction.*

This case is currently on our September , 1987 trial list and pending before us is the Defendants' motion for summary judgment. Plaintiffs (the Polks) seek under the Education for all Handicapped Children Act, 20 U.S.C. §1401, *et seq.*, to secure for Christopher Polk physical and occupational therapy delivered by licensed therapists.

II. *Procedural Background.*

The Polks assert that the current educational program provided to Christopher is inadequate. They requested and on May 2, 1986, received a hearing before Commonwealth of Pennsylvania Department of Education Hearing Officer, David Lee pursuant to 22 Pa. Code §1322. The hearing was left open for further proceedings in the form of videotape

depositions. After the depositions were taken, closing statements from the Defendants and the Polks were received respectively on August 8, 1986, and August 11, 1986. Hearing Officer Lee rendered his decision on August 26, 1986, finding that Christopher is making progress in the educational programs set forth in his Individualized Educational Program which adequately addresses his unique needs. The Polks filed exceptions and a brief in support thereof on September 11, 1986 with the Secretary of Education. On September 22, 1986, the Defendants filed a response. By order of February 18, 1986, D.K. Wright, Acting Secretary of Education, dismissed the exceptions filed by the Polks and adopted the findings of fact, conclusions of law, and recommendations of Hearing Officer Lee. Suit was filed December 17, 1986, in this Court pursuant to 20 U.S.C. §1415(e)(2) for a *de novo* review.

A motion for summary judgment, a statement of material facts, and supporting documentation was filed June 12, 1987. A brief in support of the motion was filed June 15, 1987, and an opposing brief was filed July 1, 1987. The matter became ripe on July 16, 1987, when the Defendants filed a reply brief.

When considering a motion for summary judgment, we must ascertain whether or not there are any genuine issues of material fact and, if none, whether or not as a matter of law the moving party is entitled to a judgment. Fed.R.Civ.P. 56. All factors must be considered in the light most favorable to the Polks. United States vs. Diebold, Inc., 369 U.S. 654 (1962). Summary judgment is a drastic remedy and should not be granted when there is disagreement about the facts or inferences to be drawn from them. Peterson vs. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982); Ness vs. Marshall, 660 F.2d 507 (3d Cir. 1980).

We begin by addressing the question of whether or not there are any genuine issues of material fact in this case. The Defendants filed a statement of undisputed facts on June 12, 1987 and the Plaintiffs filed a response on July 6,

1987. The facts are largely agreed upon and we are of the view that those facts that are not agreed upon are not material to the issue before us.

III. *The Facts.*

Ronald and Cindy Polk reside in the Central Columbia School District and are the parents of Christopher who was born on December 17, 1983. Christopher is a student in the Central Columbia School District and has a condition known as encepolopathy which has impaired his intellectual and physical functioning. Christopher's unique needs necessitate the provision of physical and occupational therapy services to allow him to receive educational benefits. The Defendants have provided Christopher with physical and occupational therapy under past and present Individualized Educational Programs under the Consultation Model as developed by Central Susquehanna Intermediate Unit 16. Under the Consultation Model no direct hands-on therapy is given to Christopher by licensed therapists. Instead, licensed therapists develop a program which is implemented by the classroom teacher and aide and the only contact the licensed therapists have with Christopher is a monthly monitoring of the delivery of the services by the classroom teacher and aide. After the monthly visit or on a more frequent basis if the need, as established by the classroom teacher, exists the licensed therapists determine whether a change in the program is required and, if so, the licensed therapists instruct Christopher's classroom teachers and aides so that they may provide implementation of the program on a daily basis. Under Christopher's Individualized Educational Program, the licensed therapists do put their hands on Christopher during their sessions with him although no therapy is provided at that time.

Defendants assert that the Consultation Model involves the provision of appropriate physical and occupational therapy services in the school environment and is tailored to Christopher's unique needs. The Polks disagree that the model does so because no direct hands-on therapy is pro-

vided by a licensed therapist. Since the Polks are of the view that only licensed therapists can provide hands-on physical and occupational therapy they argue that Christopher's Individualized Educational Program is not in fact "individualized" or unique to Christopher. As proof of this assertion they point to the fact that Christopher's Individualized Educational Program does not contain as educational goals "improvements in muscle tone." The Polks state that only a physical therapist could provide the service necessary to accomplish such goals.

All of the lay and expert witnesses who testified before Hearing Officer Lee agreed that Christopher has derived "some educational benefits" from the physical and occupational therapies which have been provided to him. The Polks agree that Christopher has derived "some educational benefit" but they argue that (1) "some educational benefit" is not the applicable standard and that (2) this Court must determine independently of the record below whether Christopher is receiving an "adequate educational benefit" given his unique physical, mental and emotional condition. In short, all parties agree that Christopher's Individualized Educational Program is sufficient to enable him to continue to receive "some educational benefits" but the Polks assert that this is not enough.

IV. *Summary Judgment.*

The gravamen of the Polks' position that Christopher is not receiving an adequate education is that (1) his Individualized Educational Program does not have a provision for "direct hands-on therapy" by licensed physical therapists and (2) the program does not specifically have as a stated goal the "improvement of muscle tone." We shall address each of these issues *seriatim*.

A. Direct Therapy by Licensed Physical Therapists.

The Polks contend that without direct physical therapy by licensed therapists Christopher is not receiving the educational benefits he is entitled to under 28 U.S.C. 1401, et

seq. The Defendants contend that intensive therapy is not needed for Christopher to attain some educational benefit, but if after a monthly review it was determined that he needed intensive physical therapy to benefit educationally in the classroom he would be given that therapy from a licensed therapist. The Polks base their argument that Christopher is in need of daily intensive therapy from a licensed therapist rather than therapy delivered through the Consultation Model on the fact that, in their view, Christopher has improved little from the time he entered the Central Columbia schools until now. The Polks argue that substantial progress was seen when the Polks engaged private therapists to work intensely with Christopher both in the Bloomsburg area and at Shriners Hospital in Philadelphia. In light of this argument we must determine whether or not the therapy requested by the Polks is necessary for Christopher to receive a free and appropriate public education as required by 20 U.S.C. §1412(1).

The free and appropriate public education required by the Act must be tailored to the unique needs of handicapped children by means of an Individualized Educational Program. 20 US..C. §1401(18). The Polks argue that Christopher's Individualized Educational Program as administered through the Consultation Model is not uniquely tailored to his alleged need of direct hands-on physical therapy by a licensed therapist and therefore, he is not receiving a free and appropriate public education. The Supreme Court in Board of Educ. vs. Rowley, 458 U.S. 176, 190 (1982) held that the Act's requirement of a "free and appropriate public education" is satisfied when the Commonwealth provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. The Court stated that the statute contains no requirement that states maximize the potential of handicapped children. *Id.* Instead, the Court found that Congress expressly recognized that in many cases the special education provided to a handicapped child is not guaranteed

to produce any particular outcome. *Id.* at 190-192. Noting that the Act imposes no clear obligation upon states beyond the requirement that handicapped children receive *some* form of special education ". . . sufficient to confer *some educational benefit* upon the handicapped child," Rowley, 458 U.S. 176, 202 (emphasis added), the Court went on to state that district courts should not ". . . substitute their own notions of sound educational policy for those of the school authorities which they review." Id. at 206. The Court said that a district court's only inquiry is whether the state has complied with the procedures set forth in the Act and if so, whether the Individualized Educational Program is reasonably calculated to enable the child to receive *some educational* benefits. If these requirements are met, the Commonwealth has complied with the statute. *Id.* at 206-202.

The parties do not dispute that the Commonwealth has complied with the procedures set forth in the Act in that Christopher has been provided with a free public education and an Individualized Educational Program, and the Polks have been provided with a chance to disagree with that program, a hearing before a Hearing Officer and a review by the Commonwealth's Secretary of Education. Therefore, the only question before us is whether the Individualized Educational Program is reasonably calculated to enable Christopher to receive educational benefits. We must make this determination while recognizing that we lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy while leaving the questions of the methodology of compliance to the Commonwealth. *Rowley,* 458 U.S. at 207-708; *See also* Rettig vs. Kent City School District, 720 F.2d 463, 465 (6th Cir. 1983).

All parties agree that Christopher has benefitted educationally from the therapy he has received from his teachers and aides. The only disagreement is in the amount of therapy he is receiving. Based on the testimony before

Hearing Officer Lee, it is clear that in the opinion of all persons who dealt with Christopher in the *educational* setting he is benefitting from the special program of education provided for him by the Intermediate Unit. Christopher is progressing towards the goals and objectives set forth in his Individualized Educational Program. The Polks' argument that the Individualized Educational Program for Christopher is inherently not unique since it is administered through the Consultation Model used by all students in the program is not well taken. The same consultative program may be used to address the unique needs of each student. Christopher's parents' desire that he receive therapy through a procedure other than the Consultation Model is a disagreement as to methodology. We are precluded from replacing the method the Commonwealth has chosen with our own. *Rowley,* 458 U.S. at 207; *Rettig,* 720 F.2d at 465-66. The fact that Christopher would advance more quickly with intensive therapy rather than the therapy he now receives does not make the School District's program for Christopher defective. Programs need only render some benefit; they need not maximize potential. *Rowley,* 458 U.S. 176; Monahan vs. State of Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982).

B. Improvement of Muscle Tone.

The Polks also assert that the Individualized Educational Program is defective because it does not set as a goal "improved muscle tone." We are of the view that the program goals adequately cover the goal of "increased muscle tone" Christopher's teachers testified that he is developing greater muscle control as a result of the "fine motor skills" goal incorporated into his Individualized Educational Program. That the Defendants have used the term "fine motor skills" rather than "muscle control" or "muscle tone" is not important. Even if improvement of muscle tone were not covered under fine motor skills, the Supreme Court has determined that the Act is primarily a procedural statute and does not impose a substantive duty on the state to

provide a student with other than *some* educational benefits. *Rowley,* 458 U.S. 176, 102; Monahan vs. State of Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982). Increased muscle tone may well fall outside of the scope of the requirement that Christopher receive some educational benefits from the program in which he is enrolled. Furthermore, the Polks' request that Christopher's program include a provision for increased muscle tone is merely another expression of their hope that Christopher's Individualized Educational Program would help maximize his personal development. This is not required under the Act. *Rowley,* 458 U.S. 176; *Monahan,* 687 F.2d at 1170.

Although it is laudable for Christopher's parents to attempt to obtain for him the best possible services, the law does not require the School District to supply this. Regardless of our sympathy for the Polks and our desire that Christopher be afforded the possibility to excel to his potential, we are bound by the statute and the Supreme Court's opinion in *Rowley* not to substitute our philosophy for that of the Commonwealth. It is clear to us that under *Rowley* the Defendants are entitled to a judgment as a matter of law.

V. *Other Requests.*

Counsel for the Polks in the brief in opposition to the motion for summary judgment requested that we stay a ruling on the motion for summary judgment pending a ruling on the Polks' motion for the taking of additional testimony and the motions to compel discovery. We shall deny the requests for three reasons. First, the request is not made by way of motion as is provided for in the Federal Rules of Civil Procedure and the Local Rules of this Court or supported by a brief. Second, such requests are within the sound discretion of the district court and we choose not to exercise that discretion. Third, based on the undisputed facts, the

movants are entitled to a judgment as a matter of law and therefore, the motion to take additional testimony is moot.

An appropriate order will be entered.

MUIR, U.S. District Judge

DATED: July 27, 1987

United States District Court
FOR THE
Middle District of Pennsylvania

RONALD POLK and CINDY POLK, Parents and natural guardians of CHRISTOPHER POLK,	:	Civil No. 86-1784
	:	Complaint Filed 12/17/86
Plaintiffs	:	(Judge Muir)
v.	:	
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; and CENTRAL COLUMBIA AREA SCHOOL DISTRICT,	:	
Defendants	:	

ORDER

1. The Defendants' motion for summary judgment filed June 12, 1987, granted.

2. Plaintiffs' motion for the taking of additional testimony filed July 1, 1987, is denied as moot.

3. The Clerk of Court shall close the file in this case.

MUIR, U.S. District Judge

DATED: July 27, 1987

United States District Court

FOR THE

Middle District of Pennsylvania

RONALD POLK and CINDY POLK, Parents and natural guardians of Christopher Polk	:	Judgment in a Civil Case
v.	:	Case Number: Civil 86-1784
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; and CENTRAL COLUMBIA AREA SCHOOL DISTRICT	:	

☐ *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and hereby is entered in favor of the Defendants Central Susquehanna Intermediate Unit 16 and Central Columbia Area School District and against the Plaintiffs Ronald Polk and Cindy Polk, parents and natural guardians of Christopher Polk.

DONALD R. BERRY
Clerk

DATED: July 27, 1987

By _____
Deputy Clerk

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF CHRISTOPHER P., a student in the Central Columbia School District	:	SPECIAL EDUCATION OPINION NO. 302

BACKGROUND

Christopher P. is a twelve year old who resides with his parents in the Central Columbia School District (district). Christopher is enrolled in the primary trainable mentally retarded (TMR) class located at the Bloomsburg Memorial Elementary School (Bloomsburg) and has been enrolled in that class since 1982.

During his school years at Bloomsburg, Christopher has been receiving related services in the form of physical and occupational therapy under the Consultative Model and the district proposes to continue such a placement. In the beginning of the 1985-86 school year, however, Christopher's parent challenged the appropriateness of the Consultative Model of delivering related services as set forth in his individualized education program (IEP) and requested hands-on and more frequent sessions by the respective therapists.

The hearing in this matter was held on May 2, 1986 pursuant to 22 Pa. Code §1322. The hearing was left open on that date for further proceedings in the form of videotape depositions. After the depositions were taken closing statements from the district and the parents were received respectively on August 8, 1986 and August 11, 1986. Subsequently, the hearing officer rendered his decision on August 26, 1986 finding that Christopher is making progress in the educational program set forth in his IEP and that this is an appropriate program of special education which addresses his individual needs.

The parent filed exceptions to this decision of the hearing officer, and a brief in support thereof, on September 11, 1986 with the Secretary of Education.

On September 22, 1986 the district filed a response to the parent's exceptions and a brief in support of its position.

DISCUSSION

For purposes of clarity, it is necessary to explain that a Consultative Model of therapy is developed, based on a child's IEP, in consultation with a licensed therapist. The educational program, however, including related services, is implemented by the classroom teacher and aide. Periodically, the therapist will visit the classroom to work with the teacher, aide and student. At that time adjustments to the provision of related services are made as dictated by the special educational needs of a student.

In the instant appeal, the parent contends that Christopher's IEP is inappropriate because:

1. it is not individualized since the same Consultative Model is used within the district for all 65 of the handicapped students needing the related services of physical and occupational therapy.

2. it does not provide for the development of Christopher's muscle tone through any educational goals or objectives.

First of all, an appropriate program of special education has been defined by the United States Supreme Court in the case of *Board of Education v. Rowley*, 458, U.S. 176 (1982). The Court held that the federal law requirement to provide a handicapped child with a "free appropriate public education" is satisfied "by providing personalized instructions with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 181.

Similarly, under state law, the Commonwealth Court of Pennsylvania has held that a school district is not required

to devise a special education program which makes the best use of an exceptional student's abilities but only to "develop educational programs appropriate for the needs of each child." *Shanberg v. Com., Secretary of Education*, 57 Pa. Commonwealth Ct. 384, 426 A.2d, 232, 233 (1981).

In reviewing the hearing record in this light, we conclude that substantial and indeed preponderant evidence exists to support the findings of fact, conclusions of law and ultimate recommendations of the hearing officer.

The testimony is clear on the record that, in the opinion of all persons who had contact with Christopher in an educational setting, he is benefiting from the special program of education being provided for him by the district and that he is progressing toward the goals and objectives set forth in his IEP (See N.T. 109-110, 117, 130-131, 170, 190-192, 223-225, 226-227, 246-249.)

Although the parents can be commended for seeking the best for their child, the law does not require that the services provided by the district be the best or be sufficient to maximize a child's potential. All that is required by law is that the child receive educational benefit from his program of special education. *Rowley*, 458 U.S. at 198. The testimony of a few witnesses for the parents acknowledged that what they were recommending for Christopher was prescribed to "maximize" Christopher's potential. (N.T. 27, 47, 50-52, 266-267.) This is above and beyond what the law obligates the district to provide.

The law is clear that so long as an exceptional child is achieving some benefit from his special education program that the district has fulfilled its responsibilities with regard to the provision of related services to that child.

The term related services is defined as:

> transportation, and such developmental, corrective, and other supportive services (including . . . physical and occupational therapy . . .) *as may be required to assist a handicapped child*

> *to benefit from special education*, and includes the early identified and assessment of handicapping conditions in children. (Emphasis Added). 20 U.S.C. §1401(17).

Being bound by the law, it is necessary, therefore, to deny the parent's exception challenging the appropriateness of the district's provisions of physical and occupational therapy through the use of a Consultative Model.

Merely because the Consultative Model is appropriate in providing a program of special education for other similarly handicapped students in the district does not render it inappropriate for Christopher.

Regarding the second allegation of error, whereby the parents contend that Christopher's IEP is inappropriate since it does not provide goals or objectives for the development of muscle tone, it is necessary to state the following. Although it would be helpful if the development of muscle tone was specifically mentioned, an IEP is not an all inclusive document and is not drafted in the nature of a lesson plan. *See* 22 Pa. Code §3411.15. Although the words "development of muscle tone" are not used on Christopher's IEP, many of the manual instructional objectives go to gross and fine motor skills and, consequently, the development of muscle tone. For example, using food utensils properly, dressing and undressing, pointing, bouncing a ball, and placing pegs into a pegboard involve muscle toning to some extent. *See*, S.D. Exh. #5, #10, #11. Likewise, the physical therapy consultations, evaluations and reevaluations all deal with routines and exercises to develop muscle tone. S.D. Exh. #8, #9, #10, #11. These routines and exercises are performed by the teacher and aide in class with Christopher. Thus, whether specifically documented on the IEP or not, such muscle development skills are addressed and according to the evidence adduced at the hearing are appropriate.

The exceptions of the parents are dismissed.

ORDER

This 18th day of November 1986, it is hereby ordered and decreed that the exceptions which were filed in this matter by the parents are dismissed and that the findings of fact, conclusions of law and recommendations of the hearing officer are adopted.

D. Kay Wright
Acting Secretary of Education

Hearing Officer Decision

Christopher Polk
b.d. 12/17/73
Central Columbia School District
Central Susquehanna Intermediate Unit
March 26, 1986
Closed

August 26, 1986

David Y. K. Lee
Hearing Officer

Due Process Hearing
Central Columbia School District
for Christopher Polk

I. *Persons attending hearing:*

Gary E. Norton, Esq.	Legal Counsel for Central Columbia School District
George Banks, Jr.	Program Supervisor, Central Susquehanna I.U.
Patricia D. Cihocki	Physical Therapist, Central Susquehanna I.U.
Kathleen H. DiValerio	Special Education Teacher, C.S.I.U.
George T. Herman	Special Education Director, C.S.I.U.
Jean Maier	School Psychologist, Central Columbia S.D.
Diana E. Merrill	Physical Therapist, C.S.I.U.
Adrienne L. Roth	Occupational Therapist, C.S.I.U.
Patricia Taylor	Program Supervisor, C.S.I.U.
John A. Mihalik, Esq.	Legal Counsel for Christopher Polk
Nancy MacDowell Brown	Physical Therapist, Susquehanna Physical Therapy Associates
Cindy Polk	Mother of Christopher

II. *Exhibits introduced at the hearing:*

By the School District:

1. Chronology of Christopher's education (N.T. 15).
2. Present and past classroom performance reports on Christopher (N.T. 16).
3. Physical Therapy/Occupational Therapy Consultation Model Philosophy (N.T. 60).
4. Pa. Department of Education memorandum on "Description of Physical Therapy Services on IEPs" (N.T. 60).
5. Christopher's IEP for the 1985-86 school year (N.T. 79).
6. omitted.
7. Psychological report dated 1/15/86 by Jean M. Maier (N.T. 113).
8. Physical Therapy Re-evaluation dated 10/22/85 by P. Cihocki and D. Merrill (N.T. 122).
9. Physical Therapy Consult dated 10/22/85 by P. Cihocki and D. Merrill (N.T. 126).
10. Occupational Therapy Re-evaluation dated 10/22/85 by A. Roth (N.T. 186).
11. Occupational Therapy Consult dated 10/22/85 by A. Roth (N.T. 186).

By the Parent:

Parent's exhibits were introduced as a whole (N.T. 273-274). they are hereby listed as they were marked. Groupings are done for ease of reference.

1 through 8. Christopher's program reports from June 21, 1979 to February, 1986.

9. Physical Therapy record by Nancy MacDowell Brown (N. T. 204).

10 through 12. IEPs dated 10/13/81, 9/24/82, and 10/11/84 respectively.

13 through 18-i. Physical Therapy evaluations and notes between 1978 and 1983 by Paul Slocum.

16. Occupational Therapy evaluation of 4/16/84 by A. Roth.

18-ii through 22. Educational re-evaluation and Multi-Disciplinary Team Meeting summaries between May, 1982 and May, 1985.

III. *Narrative Background of Hearing.*

Christopher, a resident of the Central Columbia School District, is a twelve year old student enrolled in the Primary TMR class located at the Bloomsburg Memorial Elementary School. He also received special education services as a pre-schooler provided by the Central Susquehanna Intermediate Unit. He was in the Prognostic Program for Severely and Profoundly Mentally Retarded for four years beginning in 1978. In 1982, his educational placement was changed to the Primary TMR class.

Christopher had been receiving related services in the form of Physical and Occupational Therapies under the Consultative Model. During the early part of the 1985-1986 school year, parent disagreed with the consultative model of delivering related services and requested hands-on and more frequent sessions by the respective therapists.

Following a continuance, the due process hearing was held on March 26, 1986 at the District Office of the Central Columbia School District. The com-

pleted transcript of the hearing was received on May 2, 1986.

Depositions were ordered (N.T. 277-279) from expert witnesses at the Shriner's Hospital in Philadelphia. Subpoenae were issued and depositions were taken on April 8, 1986. Completed transcripts of the depositions and a video tape were received on July 18, 1986 and July 23, 1986 respectively. This hearing officer was not made aware of the reason for the lengthy delay of the deposition transcripts.

Closing statements from the School District and from the Parent were received on August 8, 1986 and August 11, 1986 respectively.

IV. *Brief Statement of Position of each side.*

District — It is the District's opinion that Christopher's IEP which calls for the related service of Physical Therapy on a consultative model is appropriate.

Parent — It is the parent's contention that Christopher's IEP is not appropriate specifically in relation to the lack of more frequent hands-on therapy by a Physical Therapist.

V. *General Issues to be Resolved.*

The primary issue to be resolved is whether or not the nature and amount of related services of Physical and Occupational Therapies are appropriate for Christopher as set forth in the IEP in accordance with 22 Pa. Code Sec. 341.15.

NOTE: There seemed to be some confusion and overlapping of terminologies during the proceedings as to whether or not the actual consultative model is in itself being challenged. This was somewhat clarified when parent's counsel stated the request was for

additional direct hands-on therapy by the Physical Therapist (N. T. 250).

While most of the testimony taken was in reference to Physical Therapy, there was an underlying parallel reference to Occupational Therapy also. This Decision will address the two as one-related services.

VI. *Evidence Presented by Parties.*

The School District presented the following evidence:

1. Christopher who is twelve years old has been a student in the special education program — initially the Severe and Profound Mentally Retarded Program and then the Trainable Mentally Retarded Program — since he was four years of age. (S.D. Ex. 1. N. T. 13-14.)

2. Christopher showed progress in his educational objectives. (S.D. Ex. 2, 7. N.T. 15-35, 82-85, 108-110.)

3. Documentation of Consultative PT/OT services. (S.D. Ex. 3, 4, 8, 9, 10, 11. N.T. 123-129, 164-168, 186-189.)

4. IEP for the 1985-1986 school year indicating continuation of instructional objectives. (S.D. Ex. 5. N.T. 78-81.)

Parent presented the following evidence:

1. Christopher's educational history summaries including rating profiles, IEPs, MDT meeting summaries, related services, notes and summaries indicating the need for special education and related services. (P. Ex. 1-8, 10-22, N.T. 271-274.)

2. Christopher is receiving Physical Therapy on a private basis outside of school and is showing progress. (P. Ex. 9. N.T. 199-210.)

3. It is recommended that Christopher receives direct hands-on related services, PT and OT at least once a week. (N.T. Chiarello deposition 64-65. Ciocco deposition 24.)

VII. *Uncontested Facts and Stipulations.*

Both parties presented evidence that Christopher is severely handicapped and in need of special education and related services. (S.D. Ex. 1, 5, 7, 8, 10. N.T. 14, 109, 127-129, 165, 186-187. P. Ex. 1-22. N.T. 200-201. Chiarello deposition 11. Ciocco deposition 7.)

It was stipulated that evidence was exchanged by both parties under the due process guidelines. (N.T. 11.)

VIII. *Additional Evidence Requested by Hearing Officer.*

Additional information was not requested.

IX. *Findings of Fact.*

1. Christopher is a severely handicapped student who is in need of special education services. (S.D. Ex. 2, 7, 8, 10. P. Ex. 1-9, 18-ii-22. N.T. 14, 19-23, 109-110, 200, 221-222.)

Discussion: All of the educational records and evaluations point to mental retardation as well as physical handicapping conditions. He started preschool and school in a Severe and Profound Mentally Retarded Program and was moved to a Trainable Mentally Retarded Program with an individual aide (N.T. 230). There has not been on record any contention or evidence indicating otherwise regarding his educational identification.

2. Christopher has been receiving related services in the form of consultative Physical and Occupational Therapies. (S.D. Ex. 5, 8-11. P. Ex. 10-19. N.T. 122-124, 164-165, 186-187.)

   Discussion: Evidence to the contrary was not presented to indicate that the Consultative Model is not an acceptable means of providing PT/OT services. All the expert witnesses did not dispute the use of such model in their respective disciplines. (N.T. 214, Chiarello deposition 27, Ciocco deposition 17.)

3. Christopher is making progress in his educational program as set forth in his IEP. (S.D. Ex. 2, 5. P. Ex. 1-8, 10-12. N.T. 222-226. Chiarello deposition 47. Ciocco deposition 27.)

   Discussion: Evidence provided by both parties substantiate gains and objectives being met over time. Progress has been slow given the handicapping conditions. Nonetheless, it is evident that Christopher has benefitted from the total program involving the classroom teacher, the individual aide, speech therapy, related services of consultative OT/PT services, music and physical education. Assistance at home and individual PT notwithstanding.

X. *Conclusion of Law.*

1. Christopher is severely multihandicapped in accordance with State Standards. (22 Pa. Code Sec. 341.1 (vii), Facts 1, 2.)

   Discussion: Even though Christopher is in a TMR program with an individual aide, the

most recent psychological evaluation resulted in an I.Q. of 22 which places him in the severe and profound range (22 Pa. Code 341.1 (v) (C) and 341.1 (vii) (G).) He had a significant medical episode at seven months of age resulting in encephalopathy. He has limited motor function and has been receiving physical therapy as medically prescribed (22 Pa. Code Sec. 341.1 (vii) (B)).

2. An IEP was developed to address Christopher's special needs in accordance with State Standards. (22 Pa. Code 341.13 and Fact 3.)

   Discussion: The proposed IEP for the 1985-1986 school year which was the document in question does include all the elements set forth in the Standards. The related services to which specific objections were raised are found to be properly referenced. The IEP does not replace a lesson plan nor does it take the place of other working documents such as consultative reports (S.D. Ex. 8-11).

XI. *Recommended Order for Adoption by the Secretary of Education.*
(1 Pa. Code Sec. 35.201-35.207.)

1. Christopher is receiving an appropriate program of education as set forth in his IEP. (22 Pa. Code 341.13 and 341.15. Facts 1 through 3 and Conclusions 1 and 2).

   Reasoning: There is substantiate evidence from documents presented and from expert testimony indicating that Christopher is progressing and therefore is receiving educational benefit from his program of education as set forth in the IEP. *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690 (1982).

In reference to the related services of PT and OT, it may well be better to have more frequent hands-on therapy sessions but it cannot be then inferred that anything less is therefore inappropriate. More may indeed be better but there is no provision for an IEP to provide the best or something better. *Shanberg vs. Secretary of Education*, 57 Pa. Commw. Ct. 384, 426 A. 2d 232 (1981).

There was no apparent disagreement on record in the PT/OT evaluations by different therapists. Differences were in additional and frequency of the prescriptive exercises. The absence of total agreement again does not render one or the other inappropriate.

Expert witnesses who testified and recommended more frequent hands-on therapy did not deny the acceptance of the consultative model within the disciplines. There is no evidence on record to indicate that the consultative model is in itself inappropriate.

Furthermore, a program of education is not deemed not individualized and therefore inappropriate because there are other students being served under the same model.

XII. *Nonbinding Suggestions.*

For the School District and Parent:

1. There appears to be some misunderstanding as to what and how the related services are being provided. Conferences with the parent to go over the consultative reports by the therapists should be helpful in coordi-

nating the treatment and educational efforts in and out of school (N.T. 246-247, 263-264).

David Y. K. Lee
Hearing Officer

DATED: Aug. 25, 1986

APPENDIX "B"

VERBATIM TEXTS OF STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. The Education of the Handicapped Act, 20 U.S.C. §1401(17)-(19).

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS §1414(a)(5)].

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipation duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. . . .

2. The Education of the Handicapped Act, 20 U.S.C. §1412(1).

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education. . . .

3. The Education of the Handicapped Act, 20 U.S.C. §1415(a)-(e).

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency,

local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12) [20 USCS §1413(a)(12)].

(e) Civil action; jurisdiction. (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a

public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

4. 63 P.S. §1302.

The following definitions shall apply, when used in this act, unless otherwise expressed therein:

. . . **"Physical therapy"** means the evaluation and treatment of any person by the utilization of the effective properties of physical measures such as mechanical stimulation, heat, cold, light, air, water, electricity, sound, massage, mobilization and the use of therapeutic exercises and rehabilitative procedures including training in functional activities, with or without assistive devices, for the purpose of limiting or preventing disability and alleviating or correcting any physical or mental conditions, and the performance of tests and measurements as an aid in diagnosis or evaluation of function.

No. 88-815

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

CENTRAL COLUMBIA SCHOOL DISTRICT and CENTRAL SUSQUEHANNA INTERMEDIATE UNIT NO. 16,

Petitioners,

vs.

RONALD POLK and CINDY POLK, Parents and Natural Guardians of CHRISTOPHER POLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the granting of a writ of certiorari is appropriate at this state of the proceedings, because of the Petitioner's refusal to respond to discovery requests; because the granting of summary judgment precluded the development of a complete record; and because the district court failed to address the lack of individuality of Christopher Polk's educational program?

II. Whether the issue relating to the applicable standard of benefit under the Education for the Handicapped Act is not ripe for decision at this stage because of the necessity of a remand to determine whether direct physical therapy is a required element of Christopher Polk's individualized educational program?

III. Whether the Third Circuit Court of Appeals followed the rulings of this Court when it found that a genuine issue of material fact existed as to whether a handicapped student was denied an individualized educational program by a rigid method of delivering physical therapy services with no direct therapy by a licensed therapist in violation of the procedural requirements of the Education for the Handicapped Act and hence, no important federal question is presented?

IV. Whether the Third Circuit Court of Appeals followed the rulings of this Court in finding that an appropriate education under the Education for the Handicapped Act requires more than a de minimis or trivial advancement in the educational program of a severely handicapped child, and that a genuine issue of material fact existed with regard to whether the educational benefits Christopher Polk received from his program were consistent with the Education for the Handicapped Act, and hence, no important federal question is presented?

V. Whether no actual conflict exists between the Circuit Courts of Appeal with regard to the applicable standard of benefits required by individualized educational programs under the Education for the Handicapped Act?

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COUNTERSTATEMENT OF THE CASE

The Polks first learned at the Administrative Hearing that no other handicapped children in public schools within the Intermediate Unit's[1] region received direct therapy from licensed therapists and recognized the possibility that Christopher Polk might be the victim of a blanket policy that denied Christopher an individualized education guaranteed by the EHA. Accordingly, after filing their complaint, the Plaintiffs propounded Interrogatories and a Request for Production upon the Intermediate Unit (Res. App. 9-12)[2] directed toward whether a blanket policy denying direct physical therapy existed in the Intermediate Unit. The Intermediate Unit refused to respond to the Interrogatories and the Request for Production and the district court directed compliance with the discovery requests (Res. App. 14-18) but the issue became moot when the district court granted a Motion for Summary Judgment. Even though the district court denied a motion to strike allegations relating to the lack of individuality in Christopher's program and ordered discovery on the issue, it never dealt with the contention that the consultative model is a rigid program that denies Christopher his right to an individualized education required by the EHA. The Third Circuit Court of Appeals found genuine issues of material fact and a procedural violation of the Education for the Handicapped Act and remanded the matter for further discovery and trial.

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[1] An intermediate unit in Pennsylvania provides special education programs to various school districts throughout a region—in this case, five counties.

[2] Respondents' Appendix.

Christopher Polk is a fourteen-year-old severely handicapped youngster suffering from cerebral palsy who, when he was twelve years old, functioned at a ten-month level. Christopher is unstable, with mobility difficulties, and needs assistance to ambulate; he creeps on his hands and knees or bunny hops from place to place. He has difficulty pulling himself up to stand and he needs support at his waist to walk. He suffers from severe muscle spasticity and was described as uncoordinated with involuntary movement in his upper extremities. He cannot move his hand to his mouth to feed himself without assistance.

From 1978 through 1982, Christopher was in a class for severely and profoundly retarded children, and from 1982 through 1986, he attended a trainable mentally retarded class. Until sometime in 1980, Christopher received direct physical therapy from a licensed therapist and has had a full-time classroom aide. In 1960 the Central Susquehanna Intermediate Unit stopped providing direct[3] physical therapy and initiated a consultative model[4] (Res. App. 3) under which a licensed physical therapist develops a program of exercise that is implemented by a classroom teacher and/or classroom aide, but provides no direct therapy. The district court found that under the consultative model, "no direct hands on therapy is given to Christopher by licensed physical therapists." (Pet. App. 3a, 4a)[5]

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[3] The Third Circuit defined "direct" physical therapy as "hands on" physical therapy (Petitioners' Appendix 7a).

[4] The Third Circuit Court of Appeals presented a thorough description of the consultative model. (Pet. App. 6a, 7a)

[5] Petitioners' Appendix.

Christopher receives no direct therapy from licensed therapists even though physical therapy is specified as a related service under the Education for the Handicapped Act (EHA), 20 U.S.C. 1401(17); is called for in his individualized educational program (IEP) (Res. App. 2); and the regulations promulgated under the EHA define physical therapy as "therapy provided by a qualified therapist." (34 CFR 300.13) The Polks contend and the Third Circuit Court of Appeals agrees that because of the degree of Christopher's physical involvement, physical therapy is the essence of Christopher's educational program. (Pet. App. 26a)

The Intermediate Unit had been working with Christopher for seven years to teach him to utilize ordinary silverware, and Christopher had yet to master the following skills: scooping with spoon; eating with a spoon; raising a spoon to his mouth; eating with a fork; and spearing food with a fork. After seven years Christopher's program continued to focus on the fundamental self-help skills of dressing and basic body movements.

Despite this apparent lack of progress, Christopher's IEP, because of the consultative model, is devoid of any educational goal or objective relating to decreasing spasticity, improving muscle tone, or using adaptive devices—goals that require treatment only by a licensed physical therapist and not merely exercises by a teacher or aide. Consequently, specific educational goals enumerated in the Intermediate Unit's computerized list of goals are excluded from Christopher's program. They are: goals that relate to development positions; normalized muscle tone; competence with a walker; manipulation of braces; toilet

transfer; walking and ambulation; protective reactions; and maintaining balance while changing positions—fundamentals to Christopher's education.

During the summer of 1985, Christopher took part in a privately sponsored physical therapy program at Shriners Hospital for crippled children in Philadelphia. Afterward, he no longer finger-fed and significant improvement was noted. Christopher also showed improvement in the areas of weight bearing and use of a walker as a result of weekly direct physical therapy provided by a privately retained physical therapist. Accordingly, the Respondents assert that delivery of physical therapy services exclusively through a consultative model is not appropriate for Christopher and he is thereby denied access to meaningful educational benefits. The Polks seek only two 45-minute physical therapy sessions by a licensed therapist per week.

The Intermediate Unit contends that under the consultative model a student can receive direct physical therapy. However, its Executive Director was not aware of any handicapped student in the Intermediate Unit who received direct physical therapy from a licensed physical therapist. (Res. App. 5) One of the two physical therapists who covers the five-county Intermediate Unit area acknowledged that of the sixty-five handicapped children whose IEPs call for physical therapy, none of them receive direct physical therapy. (Res. App. 6)

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ARGUMENT

I. WHETHER THE GRANTING OF A WRIT OF CERTIORARI IS APPROPRIATE AT THIS STAGE OF THE PROCEEDINGS BECAUSE OF THE PETITIONERS' REFUSAL TO RESPOND TO DISCOVERY REQUESTS; BECAUSE THE GRANTING OF SUMMARY JUDGMENT PRECLUDED THE DEVELOPMENT OF A COMPLETE RECORD; AND BECAUSE THE DISTRICT COURT FAILED TO ADDRESS THE LACK OF INDIVIDUALITY OF CHRISTOPHER POLK'S EDUCATIONAL PROGRAM?

Because the District Court granted summary judgment before discovery was completed, an incomplete record makes the granting of certiorari inappropriate. The District Court refused to strike from the Plaintiff's Complaint allegations claiming that Christopher's IEP was not individualized because of the rigid policy precluding direct physical therapy under the consultative model. The Intermediate Unit refused to answer interrogatories (Res. App. 9-13) and to respond to a request for production of documents (Resp. App. 7, 8) relative to whether the consultative model was, in fact, a rigid program that denied all handicapped students physical therapy. The district court ordered compliance with these discovery requests but the order became moot when the district court entered summary judgment without addressing whether Christopher's IEP was the product of an illegal blanket policy.

The inadequacy of the record is attested to by the attempt of counsel for the Intermediate Unit to "testify" in his petition for writ of certiorari that four students receive direct physical therapy. With due respect to coun-

sel, a proper response to the discovery requests would have provided a more complete record at all stages of the proceedings. (Petition, p. 3) Matters not in the record should not be considered by this court. *New Haven Inclusion Cases*, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970).

Similarly, with regard to the standard of benefit issue, since the Supreme Court in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), established a case-by-case analysis, a full trial record with specific findings of fact with regard to the nature and extent of educational benefit conferred by Christopher's educational program is required for a proper analysis by this Court.

Traditionally, the Supreme Court does not grant certiorari where a case involves a review of evidence for inferences drawn from them. *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938); *National Labor Relations Bd. v. Waterman S. S. Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 (1940). While none of those cases deals with a finding by a circuit court of a genuine issue of material fact, the same principles apply to the present case where, after a review of the evidence and related inferences, the Third Circuit found there to be genuine issues of material fact with regard to the two issues before it. In those cases where the Supreme Court has granted a writ of certiorari and reviewed the reversal of

a grant of summary judgment, no genuine issue of material fact existed. *Irving Independent School District v. Tatro*, 469 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984); *Rowley*, 458 U.S. 176; *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977); *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); *United States v. Joseph V. Orleans*, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976).

Since this case is only at the summary judgment stage, no purpose is served by reviewing the Third Circuit Court's decision that genuine issues of material fact exist with regard to the "uniqueness" and "standards" issue.

II. WHETHER THE ISSUE RELATING TO THE APPLICABLE STANDARD OF BENEFITS UNDER THE EDUCATION FOR THE HANDICAPPED ACT IS NOT RIPE FOR DECISION AT THIS STAGE BECAUSE OF THE NECESSITY OF A REMAND TO DETERMINE WHETHER DIRECT PHYSICAL THERAPY IS A REQUIRED ELEMENT OF CHRISTOPHER POLK'S INDIVIDUALIZED EDUCATIONAL PROGRAM?

Since no important federal question exists with regard to the court of appeals' finding that a genuine issue of material fact exists as to whether the consultative model denies Christopher an individualized educational program, it is not necessary for this Court to consider, at this time, the issue relating to the applicable standard of benefits under the EHA. If, after trial, the district court finds that Christopher was subjected to an illegal rigid program, then the matter would be remanded to the Intermediate Unit so that Christopher would be considered as a candidate for

direct physical therapy. If Christopher were provided appropriate therapy, this matter would be moot.

If this court were to grant certiorari at this time to address the standards issue, the matter could be resolved by the lower court on grounds different from the standards issue. Judicial economy requires that the petition for writ of certiorari be denied.

III. WHETHER THE THIRD CIRCUIT COURT OF APPEALS FOLLOWED THE RULINGS OF THIS COURT WHEN IT FOUND THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER A HANDICAPPED STUDENT WAS DENIED AN INDIVIDUALIZED EDUCATIONAL PROGRAM BY A RIGID METHOD OF DELIVERING PHYSICAL THERAPY SERVICES WITH NO DIRECT THERAPY BY A LICENSED THERAPIST IN VIOLATION OF THE PROCEDURAL REQUIREMENTS OF THE EDUCATION FOR THE HANDICAPPED ACT AND HENCE, NO IMPORTANT FEDERAL QUESTION IS PRESENTED?

The Third Circuit Court of Appeals found a genuine issue of material fact as to whether the Intermediate Unit has refused, as a blanket rule, to consider providing handicapped students with direct physical therapy from a licensed physical therapist. (Pet. App. 4a)

The Intermediate Unit incorrectly asserts that the Third Circuit Court of Appeals sua sponte considered the individuality issue. (Pet. Cert. p. 14) This issue was pled, raised and briefed as found by the Third Circuit. (Pet. App. 10a, Fn.7) It was the district court that ignored the issue when it precipitously granted the motion for summary judgment. While the Polks never questioned

the procedural due process hearing, the record reflects no stipulation with regard to compliance with the procedural aspects of the Education for the Handicapped Act as they relate to Christopher Polk's educational program. Such alleged stipulations are set forth in an issue, but that issue has not been briefed by the Intermediate Unit. The Intermediate Unit also alleges that Christopher is seeking an increase in services. This is not the case. Since Christopher Polk is denied direct physical therapy by the consultative model, he is simply seeking a related service provided by the Education for the Handicapped Act since the consultative model on its face does not comport with the definition of physical therapy contained in the regulations. The Polks are not seeking hospital treatment for their son that is unrelated to his educational program. They are seeking in-school therapy as a related service under the EHA. The Intermediate Unit's assertion that direct therapy is not an educational service is contrary to 20 U.S.C. 1401(17) and *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

In declaring the application of a blanket rule to a handicapped student illegal, the Third Circuit Court of Appeals cited *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982) for the proposition that a state must devise an individualized program that addresses the handicapped child's "unique needs". (Pet. App. 14a) The Supreme Court in *Rowley* specifically stated that the free appropriate public education required by the EHA is tailored to the *unique** needs of the handi-

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* Emphasis added.

capped child (458 U.S. at 181), and that procedures must be adopted which would result in *individualized** consideration of instruction for each child.

The Third Circuit Court of Appeals also relied upon *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), cert. denied 452 U.S. 968 (1981) and *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), vacated in part on other grounds 468 U.S. 1213 (1983), reinstated in relevant part 740 F.2d 902 (1984), cert. denied 469 U.S. 1228 (1985), where rigid programs limiting education for handicapped children to 180 days were declared illegal.

In *Tatro*, 468 U.S. 883, the Supreme Court acknowledged the importance of related services under the EHA when it unanimously required a school district to provide in-school catheterization so that a handicapped child could attend regular classes, and noted that Congress intended schools to provide specially trained personnel to help handicapped children. Similary the Intermediate Unit may have to hire more than two therapists to serve its handicapped population. The *Irving* court cited 20 U.S.C. 1401(18) and noted that a "free appropriate public education" is defined as "special education and related services."

The Third Circuit Court of Appeals emphasized the importance of physical therapy to physically handicapped children because the physical problems may impede educational development in other areas, believing that in some instances physical therapy may be the core of a disabled child's special education program. (Pet. App. 12a)

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* Emphasis added.

The Third Circuit Court of Appeals, in finding a genuine issue of material fact, placed weight upon the Plaintiff's assertion that the Intermediate Unit never considered Christopher's unique need for physical therapy because of a rigid policy that precluded direct therapy. The court noted that none of the sixty-five children in the Intermediate Unit whose individualized educational programs call for physical therapy actually receives direct physical therapy (Pet. App. 13a), contrary to the assertion of the Intermediate Unit. (Petition, p. 15)

Contrary to the assertion of the Intermediate Unit, its own description of the consultative model (Res. App. 3, 4) shows no flexibility in the program with regard to direct therapy. In reversing the judgment of the district court, the Third Circuit Court of Appeals drew all reasonable inferences in favor of the non-moving party and believed that the Plaintiff should be given an opportunity to continue his discovery into whether the consultative model was an illegal, rigid program. (Pet. App. 15a, 16a)

Under Supreme Court Rule 17(c) no important question of federal law is presented because the Third Circuit Court of Appeals simply found a genuine issue of material fact based upon the dictate of the EHA that educational programs must be individualized and take into account handicapped children's unique needs.

IV. WHETHER THE THIRD CIRCUIT COURT OF APPEALS FOLLOWED THE RULINGS OF THIS COURT IN FINDING THAT AN APPROPRIATE EDUCATION UNDER THE EDUCATION FOR THE HANDICAPPED ACT REQUIRES MORE THAN A DE MINIMIS OR TRIVIAL ADVANCEMENT IN THE EDUCATIONAL PROGRAM OF A SEVERLY HANDICAPPED CHILD, AND THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED WITH REGARD TO WHETHER THE EDUCATIONAL BENEFITS CHRISTOPHER POLK RECEIVED FROM HIS PROGRAM WERE CONSISTENT WITH THE EDUCATION FOR THE HANDICAPPED ACT, AND HENCE, NO IMPORTANT FEDERAL QUESTION IS PRESENTED?

The Intermediate Unit contends that the Third Circuit disregarded the teachings of *Rowley*, 458 U.S. 176, by applying a broad standard of educational benefit. To the contrary, the Third Circuit's holding is narrow and wholly consistent with *Rowley* and the EHA. The Appeals Court simply held that the EHA requires that an educational program provide more than a trivial educational benefit. (Pet. App. 21a)

The Third Circuit Court of Appeals acknowledged that *Rowley* prohibits standards of benefit that require maximizing potential and interference with educational methods. The Third Circuit noted the Supreme Court in *Rowley* specifically chose not to establish any one test to determine the adequacy of benefits required by the EHA. *Rowley*, 458 U.S. at 202. Moreover, *Rowley* does not eliminate all judicial responsibility for review of the substantive quality of educational programs and specifically required that access to education for handicapped children be meaningful. *Rowley*, 458 U.S. at 192.

In *Irving Independent School District v. Tatro,* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), this Court specifically rejected the argument that the federal courts have no role in the substantive review of state educational programs. (468 U.S. at 890, 82 L.Ed.2d at 672, Fn.6) The *Irving* Court specifically required an analysis relating to a school's substantive obligation under the "related services requirement" of Section 1401(17). The present case presents the substantive question as to whether denial of direct therapy to Christopher Polk violates the EHA. If the standard suggested by the Intermediate Unit were to prevail, even the restricted scope of substantive review would be eliminated and the Education for the Handicapped Act would become meaningless.

The Third Circuit simply found that there was a genuine issue of material fact as to whether Christopher was receiving only trivial or de minimis benefit. The Intermediate Unit focuses on the Supreme Court's use of the phrase "some benefit" in *Rowley* and argues that the Court meant "some benefit no matter how insignificant." In *Rowley* the Supreme Court accepted the finding by the district court that Amy Rowley's benefits were substantial. The Intermediate Unit also ignores the statement by the Supreme Court that access to education must be meaningful.

The Third Circuit's decision that the EHA requires more than trivial educational advancement is supported by its analysis of the Act's legislative history. (Pet. App. 23a-26a) The appeals court also distinguished the present case from *Rowley* because in *Rowley* the Supreme Court specifically limited its decision to the facts before it; because *Rowley* dealt with a request for extraordinary

assistance whereas physical therapy is recognized by the EHA as a related service; and because Christopher's severe condition required an analysis different than that given Amy Rowley.

The Third Circuit Court of Appeals found that a genuine issue of material fact existed as to whether Christopher was receiving only trivial educational benefits (Pet. App. 34a) under the EHA based upon evidence showing rapid progress after direct physical therapy was provided by Shriners Hospital for Crippled Children and by a private therapist; because the Intermediate Unit was working on the same skills for a number of years; because of the testimony from Christopher's therapist that the delivery of physical therapy through a consultative model is not appropriate for Christopher; and because certain educational goals, such as improvement of muscle tone, can be delivered only by a licensed physical therapist.

The Intermediate Unit asserts that *Rowley* would uphold an educational program that provided any benefit no matter how trivial or meaningless, and asserts that the limited skills Christopher has were the result of public education, because he had no skills before he started, and ignores the fact that he is deprived of access to direct physical therapy, a very important part of his program.

The Intermediate Unit also argues that nowhere in *Rowley* "are meaningful benefits a substantive requirement under the EHA." (Petition p. 9) Is it really the position of the Intermediate Unit that the requirements of the EHA be programs that provide "meaningless benefits"?

The question to be resolved at trial is whether Christopher's educational program, absent direct physical ther-

apy, provides the benefits to which Christopher is entitled under the EHA. The Third Circuit's Opinion that there was a genuine issue of material fact that benefits were denied is consistent with *Rowley*, and no important question of federal law has been presented under Supreme Court Rule 17(c).

V. WHETHER NO ACTUAL CONFLICT EXISTS BETWEEN THE CIRCUIT COURTS OF APPEAL WITH REGARD TO THE APPLICABLE STANDARD OF BENEFITS REQUIRED BY INDIVIDUALIZED EDUCATIONAL PROGRAMS UNDER THE EDUCATION FOR THE HANDICAPPED ACT?

No actual conflict exists between the circuit courts with regard to the application of the standard of benefit required by the EHA. The lower courts have applied the case-by-case analysis required by *Rowley* to varied patterns generated by a plethora of handicapping conditions. The cases cited by the Petitioner do not show a conflict.

For example, in *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), the Fourth Circuit followed *Rowley* acknowledging that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. In *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983), the First Circuit applied *Rowley* and required residential placement for a severely handicapped child with significant behavior problems. Just as access to physical therapy is essential to Christopher Polk's educational progress, access to residential care was essential for the student in *Abrahamson* to make any educational progress at all. Some benefit of a trivial nature would be achieved in a day program, but the program would not have been appropriate for the student's needs.

In *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir., 1983), the Fifth Circuit Court of Appeals dealt with a categorical 180-day limit, and made reference to the phrase "some educational benefit," but the case did not deal with a specific program on handicapping conditions.

In *Springdale School District No. 50 v. Grace*, 693 F.2d 41 (8th Cir., 1982) a school district challenged a recommended placement in a private school for the deaf. The circuit applied *Rowley* to find that placement in the regular classroom was appropriate. In *Dept. of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), the Ninth Circuit Court of Appeals found that home bound instruction was inappropriate for a handicapped student who could function in a mainstream environment. The analysis of *Rowley* in *Grace* and *Katherine D.* is complicated by the policy of the EHA favoring mainstreaming.

The Third Circuit Court of Appeals and the other circuits are consistently applying the case-by-case analysis required by *Rowley* and are requiring programs that provide meaningful access to educational programs with more than trivial educational benefits, and no actual conflict exists under Rule 17(a).

CONCLUSION

Since the Supreme Court generally does not review evidentiary matters, it should defer to the judgment of the Third Circuit Court of Appeals that genuine issues of material fact exist. The sparse record presented to the Court would make review of the issues unproductive at this stage of the proceedings.

Moreover, since the Supreme Court in *Rowley* established a case-by-case analysis of sufficiency of benefits under the EHA, no important federal issue is presented since the Third Circuit's decision was consistent with the benefit standards and individualized education requirements of the EHA and the ruling of this Court.

The Respondents should be permitted to pursue their action through trial to show, as they contend, that the consultative model is a deliberate attempt to eliminate direct physical therapy as a service to handicapped children in the Central Susquehanna Intermediate Unit.

Respectfully submitted,

JOHN A. MIHALIK, ESQ.
HUMMEL, JAMES & MIHALIK
29 E. Main Street
Bloomsburg, PA 17815
717 784-7367
Attorney for the Respondents

INDIVIDUALIZED EDUCATION PROGRAM

Student Christopher Polk — Date IEP Developed ———

Birthdate 12/17/73 — Evaluator(s) Kathy Divalerio

Dist. of Residence Central Columbia — Special Program Trainable Mentally Retarded

Special Education Primary Assignment(s)	Full, Part-time or Itinerant	Date Started/ Duration	Personnel/Title
Trainable Mentally Retarded	Full-Time	8-85 - 8-86	Kathy Divalerio Spec. Ed. Teacher
Speech and Language	Itinerant	8-85 - 8-86	Barb King Speech Correctionist

Regular Classroom Activities Provided: None

Related Services	Individual or Special Class	Date Started Duration	Personnel/Title
Bus Transportation	Individual	8-85 - 8-86	T. Marquette
Domestic	Special Class	8-85 - 8-86	Team Director J. Points Music Teacher
Physical Education	Special Class	8-85 - 8-86	N. Evans Phys. Ed. Teacher
Occupational Therapy Consultation	Individual once per mo. or as needed	8-85 - 8-86	(Illegible) Occ. Therapist
Physical Therapy Consultation*	**Individual once per mo. or as needed**	**8-85 - 8-86**	**P. Checki Phys. Therapist**

Special Devices/Materials/Methods:

— Hearing Aid — Wheelchair — Special Lighting
— Sign Lang. ✓ Braces — Lrg. Print Texts
✓ Lang. Board — Other — Sound Amplification
— Head Protector

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* Emphasis added.

CURRENT EDUCATIONAL PERFORMANCE

TEST/INFORMAL DEVICE	DATE	RESULTS
CBIS Objectives	9/85	Beginning Readiness Level
Teacher Made Readiness Checklist	4/85	
TMR School Competency Scales	4/85	15th Percentile (Full-Scale)

DESCRIBE PERFORMANCE IN GENERAL TERMS: Chris' self-help skills are slowly improving. He is eating more independently and assists during toileting. Chris is at a beginning readiness level in cognitive skills. Chris is able to locate all self-identification information on his language board. He can correctly match the letters of his name, read his full name, and discriminate some colors and shapes. Chris' attention span and cooperation have improved over the past year, through his visual attention to a task continues to be a weakness. His distractability causes much inconsistency in his work. Chris has begun to work independently for short periods of time on tasks which he enjoys.

PHYSICAL THERAPY/OCCUPATIONAL THERAPY CONSULTATION MODEL PHILOSOPHY

A consultation model for the delivery of Physical and Occupational Therapy services provides students with a more continuous and enriched educational experience. A consultation model attempts to combine and integrate PT/OT activities within the realm of everyday teaching activities, utilizing the classroom teacher as the primary resource. The thrust of a consultation model of PT/OT is not to provide the traditional treatment as available in medical and health care settings.

In the consultation model, the therapist interacts with the classroom teacher and/or other educators who deal with the child on a regular and consistent basis and who are ultimately responsible for the child's educational performance. The therapist as a consultant increases the teacher's awareness of a handicapped child's need. The therapist instructs the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences.

The Occupational Therapy Consultant evaluates and provides activity suggestions and recommendations relating to the individual education program for fine motor development, sensory perceptual integration, upper extremity development, self-care and adaptive equipment as needed. Specific examples might include: a hand strengthening activity, an adaptive pencil, feeding device or sensory activities in order to enable the child to meet the demands of school, play and social life.

A Physical Consultant provides recommendations to school personnel for the physically disabled individual. These recommendations include techniques and methods to improve muscle strength, balance, coordination, range of motion, gross motor functioning, ambulation, posture and adaptive seating . This consultation service is provided to enhance the student's performance in the classroom by meeting his or her individual needs.

• • •

(p. 70) Dr. Herman—Cross

in another part of the building; and so for some specific activities, the youngster could, in fact, be removed from the classroom and that activity take place and then return. That could happen.

Q. It could. Are you aware in the entire intermediate unit of any such situation?

A. Not personally, no.

Q. Who would be aware of that?

A. The physical therapist who deals directly with the kids.

Q. Who was the supervisor in charge of all PT and OT?

A. Edward Glennan.

Q. And you are saying it is within the consultive model where a student could receive direct physical therapy services within the school?

A. Yes.

Q. But off the top of your head, you don't know if that is being provided?

A. I have no first-hand knowledge of that, no.

Q. Are you aware of any criteria from management on down to guide the multi-disciplinary team to determine when the consultive model should be used, when the direct therapy should be used, and

• • •

* * *

(p. 144) Mrs. Merrill—Cross

that aspect of the IEP, and there is no dispute there is progress because of this. Do you understand where we are coming from?

A. Yes.

Q. We will use then treatment, which is probably a good suggestion. Did you ever recommend treatment for Chris?

A. No.

Q. Why is that?

A. Because I felt that the consultation model provided nicely for him. I didn't think, and I don't think now, that treatment is needed for him to make progress because he shows he is making progress during the consultation model.

Q. Do you treat other students?

A. Through the consultation model.

Q. Outside the consultation model, not to confuse you.

A. Not treatment that you would traditionally find in a hospital setting.

Q. Do you know of any physical therapist who treats handicapped children in the school system outside the consultative model?

A. In SIU, no.

Q. You know of none?

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of Christopher Polk, Plaintiffs,	)	CIVIL NO. 86-1784
VS.	)	Complaint filed 12/17/86
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT #16, CENTRAL COLUMBIA AREA SCHOOL DISTRICT and BLOOMSBURG AREA SCHOOL DISTRICT, Defendants.	)	(Judge Muir)

PLAINTIFF'S FIRST REQUEST TO PRODUCE DOCUMENTS TO DEFENDANT CENTRAL SUSQUEHANNA INTERMEDIATE UNIT

You are requested to produce at the law office of Hummel, James & Mihalik, 29 E. Main St., Bloomsburg, PA 17815-1989, within forty-five days of service hereof, at reasonable expense, the following:

1. All individualized educational programs for the school year 1985-1986, after appropriate measures have been taken to protect the confidentiality interest of the student whose IEP calls for the delivery of physical and/or occupational therapy services.

RESPONSE: This request is objected to as being beyond the scope of discovery, unduly burdensome and intended for purposes of harassment.

2. All materials relating to physical and/or occupational therapy for each of the students set forth above

that were utilized for the preparation of each individualized educational program.

RESPONSE: This request is objected to as being beyond the scope of discovery, unduly burdensome and intended for purposes of harassment.

LAW OFFICES OF
DERR, PURSEL & LUSCHAS
GARY E. NORTON, ESQUIRE
Attorney for Defendants
238 Market Street
Bloomsburg, PA 17815

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

BY:_____
Frank J. Lavery, Jr., Esq.
130 Locust Street
P.O. Box 811
Harrisburg, PA 17108-0811

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of CHRISTOPHER POLK,	)	
Plaintiffs,	)	
VS.	)	
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; CENTRAL COLUMBIA AREA SCHOOL DISTRICT; and BLOOMSBURG AREA SCHOOL DISTRICT,	)	CIVIL ACTION NO. 86-1784
Defendants.	)	

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO SUSGUEHANNA INTERMEDIATE UNIT

You are required to answer the within Interrogatories in writing and under oath, within forty-five (45) days from date of service thereof and serve a copy upon Counsel for the Plaintiff. These Interrogatories are deemed to be continuing.

1. During the 1985-86 school year, set forth the number of students whose individualized educational programs called for either physical therapy or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

2. Of the students set forth above, set forth the number who received during the school year direct hands on physical therapy not part of the consultive model through which the therapist works with the teacher or the teachers aid in the delivery of physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

3. Set forth the date when the consultive model was adopted by Intermediate Unit 16 for the delivery of physical and occupational therapy services.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter.

4. Set forth the date that the consultive model for the delivery of physical and occupational services was implemented.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter.

5. Set forth the manner in which physical therapy and occupational therapy services were delivered to handicapped students prior to the implementation of the consultive model.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient

source and that this subject was covered in a prior hearing on this matter.

6. Set forth the names and addresses of all persons responsible for the adoption and implementation of the consultive model for the delivery of occupational services.

Dr. George Herman, Central Susquehanna Intermediate Unit, Box 213, Lewisburg, PA 17837.

7. For each of the students whose individualized educational programs provide for occupational and/or physical therapy set forth a description of the handicapping condition and the program in which the student was enrolled for the 1985-1986 program.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

8. For each of such students set forth in the preceeding Interrogatory, identify all documents that gave rise to the determination that the student was entitled to physical and/or occupational therapy under the Education for the Handicapped Act.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

9. With respect to each student, set forth in Interrogatory No. 8 identify all documents which the Defendants rely upon to justify the proposition that the delivery of physical and/or occupational therapy was appropriate through the consultive model rather than hands-on or-direct therapy since the implementation of consultive model.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

10. Has any student or person on the student's behalf challenged the appropriateness of the delivery of physical or occupational therapy services through the consultive model?

No.

11. If so please identify all documents relating to such challenge.

See No. 10.

12. From the date of the implementation of the consultive model to the start of the 1985-86 school year, set forth the number of students whose Individualized Educational Programs called for either physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

13. Of the students set forth above, set forth the number who received during the school year direct hands-on physical therapy not part of the consultive model through which the therapist works with the teacher or teachers aid in the delivery of physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

LAW OFFICES
HUMMEL, JAMES & MIHALIK

/s/ John A. Mihalik
JOHN A. MIHALIK, ESQUIRE
29 E. Main St.
Bloomsburg, Pa. 17815

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

Dated: 2/17/87

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of CHRISTOPHER POLK,	)	
Plaintiffs,	)	Civil No. 86-1784
vs.	)	Complaint Filed 12/17/86
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; et al.,	)	(Judge Muir)
Defendants.	)	

ORDER #1 of

JULY 21, 1987

(Filed July 21, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This case is currently on our September, 1987, trial list. On May 29, 1987, the Plaintiffs filed a motion to compel answers to interrogatories. A brief in support thereof was filed June 12, 1987. Central Susquehanna Intermediate Unit 16 (hereinafter Intermediate Unit 16) filed an opposing brief on June 30, 1987. On July 15, 1987, the Plaintiffs filed a reply brief and the matter became ripe.

Plaintiffs filed this complaint on December 17, 1986 under the Education for the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, seeking hands-on physical therapy for Chris-

topher Polk, a handicapped student in the Central Columbia School District. The School District has delegated its responsibility for providing special education services to Intermediate Unit 16. The complaint alleges that the Intermediate Unit provides physical therapy to Polk through a consultive model whereby a licensed therapist sets up the program which is delivered by a classroom teacher and aide. The Plaintiffs allege that this type of therapy is inadequate. They assert that Polk requires hands-on therapy by a licensed physical therapist on a regular basis.

On December 23, 1986, the Plaintiffs served upon Intermediate Unit 16 a set of 13 interrogatories. Only interrogatories 6, 10 and 11 were answered with an answer other than "This interrogatory is objected to as being outside the scope of discovery and unduly burdensome." or "This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter." Based on these answers, Plaintiffs seek an order compelling answers and sanctions pursuant to Local Rule 402.9 and Fed.R.Civ.P. 37(a)(4). We shall address each of these requests *seriatim*.

Fed.R.Civ.P. 26(b) provides for broad discovery. Any matter which is relevant and not privileged is discoverable. In short, any matter which is germane to the subject or could reasonably lead to other information which is relevant to any issue in the case is discoverable. Oppenheimer Fund, Inc. vs. Sanders, 437 U.S. 340 (1978). The District Court's power to compel discovery is broad and we should favor full and fair disclosure while only protecting against questions which are burdensome, un-

reasonably complex, or clearly irrelevant. Felix A. Phillet, Inc., vs. Kelly-Springfield Tire Co., 41 F.R.D. 55, 57-58 (E.D. Pa. 1966). *See also* 4 Moore, Fed.Prac. & Proc. § 26.16.

We construe the two separate statements of objections to the interrogatories made by Intermediate Unit 16 as one general objection on the grounds of relevancy and burdensomeness. It is Intermediate Unit 16's position that the only question before this Court is whether Christopher Polk is receiving a free and appropriate public education pursuant to 20 U.S.C. § 1412(1) and in order to determine that we need only determine whether the program Polk is enrolled in is reasonably calculated to enable him to receive educational benefits. *See* Hendrick Hudson School Dist. vs. Rowley, 458 U.S. 176 (1982). While we are aware that the issues in this case must flow directly from the statute, discovery is not so limited. Discovery may be had on items which may later be found to be irrelevant and excludable at trial. Furthermore, discovery may be had of items which in and of themselves are not relevant but which could lead to other relevant matters.

All of the interrogatories clearly deal with the education Polk and others are receiving. We are of the view that they are proper and not burdensome. Most can probably be answered by an appropriate official at the Intermediate Unit without the expediture of much time or effort.

Having determined that the interrogatories propounded were proper and should be answered, we must now ascertain whether or not sanctions should be imposed pursuant to Local Rule 402.9 and Fed.R.Civ.P. 37(a)(4). Lo-

cal Rule 402.9 allows sanctions, including the payment of reasonable expenses and attorney's fees if a party abuses the discovery process by resisting discovery. Fed.R.Civ.P. 37(a)(4) states that a Court shall award reasonable expenses ". . . unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Intermediate Unit 16 in its opposing brief filed June 30, 1987, fails squarely to address the issue of sanctions. Instead, the Intermediate Unit discusses the merits of this case and the issues involved, stating that because the issue in this case is narrow, discovery must be narrow. We are of the view that this position was not well taken because discoverable material need not be relevant in and of itself if it can lead to other relevant evidence. This, coupled with the fact that the Intermediate Unit has failed squarely to address the issue of sanctions in its brief in opposition to the motion to compel, is disturbing.

The burden of persuasion is clearly on the party who has lost in the motion to compel to avoid the assessment of expenses and fees rather than on the winning party to obtain such an award. The key element of Rule 37(a)(4) is that the loser pays. *See e.g.*, 8 Wright & Miller Fed. Prac. & Proc., § 2288 (1980) and cases cited at n. 26. Nevertheless, we are hesitant to award fees at this time because the point has not been fully addressed. We shall require the parties to attempt to work out the issue of sanctions. If this is not possible, the movant shall reapply for such expenses in accordance with the dispositive portion of this order.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' motion to compel interrogatories and for sanctions filed May 29, 1987, is granted insofar as it requests that we order full and complete answers to the interrogatories propounded and denied without prejudice insofar as it requests sanctions.

2. Central Susquehanna Intermediate Unit No. 16 shall within 15 days of the date of this order fully and thoroughly answer the interrogatories propounded to it.

3. Counsel for the Plaintiffs and Central Susquehanna Intermediate Unit 16 shall confer, although not necessarily face to face, within 10 days of the date of this order in an attempt to resolve the issue of sanctions.

4. Should counsel fail to resolve the issue of sanctions, counsel for Plaintiffs may file a motion requesting sanctions and a brief in support thereof within 15 days of the date of this order. Counsel for Central Susquehanna Intermediate Unit 16 may file a brief in opposition to any motion for sanctions filed by Plaintiffs' counsel within 10 days of the filing of such a motion. Plaintiffs may file a reply brief within 5 days of the filing of any opposing brief.

5. Should counsel be unable to resolve the issue of sanctions and a motion be filed, failure to oppose that motion shall result in the awarding of attorney's fees.

/s/ Muir
MUIR, U.S. District Judge

MM:bd